Supreme Court, U. S.
FILED
JAN 5 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-946

CITY OF MADISON, JOINT SCHOOL DISTRICT No. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG AND BURKE AND ITS AGENT THE BOARD OF EDUCATION, CITY OF MADISON JOINT SCHOOL DISTRICT No. 8.

Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION and MADISON TEACHERS INCORPORATED.

Appellees.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

JURISDICTIONAL STATEMENT

Henry A. Gempeler
City Attorney

Gerald C. Kops
Deputy City Attorney

Attorneys for Appellants
545 W. Dayton Street
Madison, Wisconsin 53703

INDEX

Page

NATURE OF CASE 1

CITATION TO DECISIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 3

QUESTION PRESENTED 4

STATEMENT OF THE CASE 5

Material Facts 5

Stage and Manner in Which Federal Question Was Raised and Decided Below 7

THE QUESTION IS SUBSTANTIAL 8

A. *It is Clear this Case Falls within the Courts Appeal Jurisdiction* 8

B. *The Question Presented by the Wisconsin Supreme Court Decision is Substantial because of its impact Upon the System of Free Expression which is the Essence of Our Democratic System of Government.* 10

C. *The Question posed by the Wisconsin Supreme Court Decision is also Substantial because the Court Misjudged the Scope of the Labor Relations Doctrine of Exclusivity as Announced by this Court in* Medo Photo Supply Corp. v. NLRB *321 US 378 (1944).* 12

Page

D. Review of the Decision is Essential Because it Affects Future Activity of Every Public Body in Wisconsin 13

CONCLUSION 14

APPENDIX INDEX

DECISION OF THE WISCONSIN SUPREME COURT ... 101

Majority Decision 101

Dissent 116

DECISION OF DANE COUNTY CIRCUIT COURT 126

DECISION OF WISCONSIN EMPLOYMENT RELATIONS COMMISSION 132

Findings of Fact 133

Conclusion of Law 139

Order 140

Memorandum Accompanying the Findings of Fact, Conclusions of Law and Order 148

DENIAL OF REHEARING 168

NOTICE OF APPEAL 169

MUNICIPAL EMPLOYMENT RELATIONS ACT SECTION 111.70 WIS. STATS. (1971) 170

CONSTITUTIONAL PROVISIONS INVOLVED 179

TABLE OF CITATIONS

CASES CITED

Akron Board of Education v. State Board (6th Cir. 1974), 490 F. (2d) 1285 *cert. den.* 417 U.S. 932 ..... 3, 10

Page

Barrows v. Jackson (1953), 346 US 249 ..... 3, 10

Board of Education v. Allen (1968), 392 US 236 ..... 2, 9

Board of Education v. York (10th Cir. 1970), 429 F. 2d 66 ..... 3, 10

Brewer v. Hoxie School District No. 46 (8th Cir. 1956), 238 F. 2d 91 ..... 2, 9

Garrison v. Louisiana (1964), 379 US 64 10

Gooding v. Wilson (1972), 405 US 518 12

LaCrosse Telephone Corporation v. Wisconsin Board (1948), 336 US 18 ..... 3, 8

Lathrop v. Dohonue (1960), 367 US 820 ..... 3, 8

Medo Photo Supply Corporation v. NLRB (1944), 321 US 378 ..... 12, 13

Napue v. Illinois (1958), 360 US 264 ..... 3, 9

New York Times v. Sullivan (1964), 376 US 254 10

Pickering v. Board of Education (1968), 391 US 563 ..... 3, 9, 11

Police Dept. City of Chicago v. Mosley (1972), 408 US 92 12

Raley v. State of Ohio (1958), 360 US 423 ..... 3, 9

Page

Saltonstall v. Saltonstall (1927),
276 US 260 ..... 3, 9

Shelton v. Tucker (1960),
364 US 479 10

Smith v. Board of Education (8th Cir. 1966),
365 F. 2d 770 ..... 3, 10

Thomas v. Collins (1945),
323 US 516 10

United States v. Washington Post Co. (1971),
403 US 713 12

Wood v. Strickland (1974),
420 U.S. 308 ..... 3, 9, 11

STATUTES INVOLVED

Wisconsin Statutes 1971

Sec. 111.70 2

(1) 3

(2) 3

(3) 3,8

(a) 8

1 8

4 8

(4) 3

(6) 3

227.20 2

Page

United States Statutes

28 USC Sec. 1257 (2) 2,8

United States Constitution

Article I Amendments to United States Constitution 3

Article XIV Section I Amendments to United States Constitution 3

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. _____

CITY OF MADISON, JOINT SCHOOL DISTRICT No. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG AND BURKE AND ITS AGENT THE BOARD OF EDUCATION, CITY OF MADISON JOINT SCHOOL DISTRICT No. 8.

Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION and MADISON TEACHERS INCORPORATED.

Appellees.

ON APPEAL FROM THE SUPREME COURT

JURISDICTIONAL STATEMENT

NATURE OF THE CASE

Appellants appeal, from the final judgment of the supreme court of the State of Wisconsin, affirming the judgment of the Dane County circuit court which affirmed an order of the Wisconsin Employment Relations Commission (hereinafter WERC). The final judgment was entered September 30, 1975. This statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

CITATION OF DECISIONS BELOW

The opinion of the Wisconsin supreme court (A.App. pp. 101-25) is reported officially at 69 Wis. 2d 200 and unofficially at 231 N.W. 2d 206 and 89 LRRM 2929. The decision of the Wisconsin Circuit Court on appellant's petition for review (A.App. pp. 126-31) is not reported. The findings of fact, conclusions of law, order and memorandum, accompanying findings of fact, conclusions of law and order of the WERC (A.App. pp. 132-67) are not officially reported.

JURISDICTION

This action was originally brought pursuant to Sec. 111.70 Wis. Stats. (1971) before the WERC.

The appellants sought review, and reversal of the WERC decision in the Dane County circuit court pursuant to Section 227.20 Wis. Stats. (1971). The appellants appealed the judgment of the circuit court affirming the decision of the WERC to the Wisconsin supreme court. The judgment of the Wisconsin supreme court was entered June 30, 1975. Appellant's motion for rehearing was denied September 30, 1975

A notice of appeal to the United States Supreme Court was filed December 5, 1975 with the Wisconsin supreme court.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Board of Education v. Allen* 392 U.S. 236 (1968); *Brewer v. Hoxie School District No 46* 238 F. (2d) 91 (8th Cir. 1956);

Akron Board of Education v. State Board 490 F. (2d) 1285 (6th Cir. 1974), *cert denied* 417 U.S. 932 (1974); *Board of Education v. York* 429 F. 2d 66 (10th Cir. 1970); *Smith v. Board of Education* 365 F. (2d) 770 (8th Cir. 1966); *Raley v. Ohio* 360 U.S. 423 (1958); *Napue v. Illinois* 360 U.S. 264 (1958); *Lathrop v. Dohonue* 367 US 820 (1960); *LaCrosse Telephone Corporation v. Wisconsin Board* 336 US 18 (1948); *Saltonstall v. Saltonstall* 276 US 260 (1927); *Barrows v. Jackson* 346 US 249 (1953); *Pickering v. Board of Education* 391 US 570 (1968); *Wood v. Strickland* 420 US 308 (1974).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The case involves Wisconsin Municipal Employment Relations Act, Section 111.70 (1) (2) (3) (4) and (6) Wis. Stats. (1971). The Act may be found in Volume 1 Wisconsin Statutes (1971) p. 2141-2147. The relevant Sections are set forth in the Appendix (A.App. pp. 170-78). The Constitutional provisions involved in this appeal are Article I Amendments to United States Constitution and Article XIV Section I Amendments to United States Constitution (A.App. p. 179).

QUESTION PRESENTED

Whether a state labor statute may constitutionally require that a duly elected Board of Education refuse to permit a teacher employee the opportunity to speak and present a petition to the Board on a matter subject to collective bargaining at a regular board meeting during the portion of the meeting devoted to public appearances.

STATEMENT OF THE CASE

Material Facts

On December 6, 1971 negotiations between Madison Board of Education and Madison Teachers Incorporated (hereinafter MTI) had reached an impasse following eleven months of bargaining. MTI was the recognized exclusive bargaining representative for the Madison district school teachers. The bargaining relationship between the Board and MTI is governed by the Wisconsin Municipal Employment Relations Act (Section 111.70 Wis. Stats. (1971)) which makes it a prohibited labor practice for a public employer to refuse to bargain collectively with the majority representative or to interfere with, restrain or coerce employees in their collective bargaining rights.

At its regular board meeting of December 6, 1971, during the portion of the meeting devoted to public appearances, the Board of Education permitted a number of individuals including a representative of MTI and a teacher employee, who was not a member of MTI, the opportunity to speak and present a petition. Albert Holmquist, the teacher employee, addressed the Board as follows:

> "My name is Albert Holmquist. I reside at 5626 Crestwood Place. I am another teacher. I represent an informal committee of 72 teachers in 49 schools. I would like to inform the Madison Board of Education, as I already have the Madison Teachers, Incorporated, about the results of an informational survey regarding one of the thirteen or so items now on the conference table and one of the main items that will certainly be included in some form in the new package."

He then read the petition:

> "To: Madison Board of Education, Madison, Teachers, Incorporated. We the undersigned ask that the fair-share proposal (agency shop) being negotiated by Madison Teachers, Incorporated and the Madison Board of

Education be deferred this year. We propose the following: 1) The fair-share concept being negotiated be thoroughly studied by an impartial committee composed of representatives from all concerned groups. 2) The findings of this study be made public. 3) This impartial committee will ballot (written) all persons affected by the contract agreement for their opinion on the fair-share proposal. 4) The results of this written ballot be made public."

He added:

> We feel this study necessary because neither the board's negotiators who have placed entirely too much emphasis on this one point nor Madison Teachers, Inc. which speaks euphemistically about the "whole package" and therefore is not issue specific ... Neither has properly addressed the serious issue of fair-share and agency shop. We find much confusion in the proposal as it stands and even more on the part of teachers' interpretations of it.
>
> For evidence, 417 teachers from the 31 schools which represents 53% of the total number of these faculties of these schools ... who have called in to this hour have signed the petition on the first day it was taken to their schools. Due to this confusion, we wish to take no stand on the proposal itself, but ask only that all alternatives be presented clearly to all teachers and more importantly to the general public to whom we are all responsible. We ask simply for communication, not confrontation."

When he finished, the Board president asked whether he intended to communicate the petitions to the Board. Mr. Holmquist replied he did. There was no other exchange between Mr. Holmquist and any member of the Board.

After the public meeting ended, the Board went into closed session to prepare for a negotiation meeting scheduled for the next day. The Board adopted a resolution to accept the total package demanded by MTI but not including fair-share. MTI accepted the Board's offer at the next day's bargaining session, reaching tentative agreement.

MTI filed a complaint in January, 1972 with the WERC alleging that the Board had committed a prohibited labor practice when it listened to Holmquist at its public meeting. The WERC held that the activities of the Board at its public meeting constituted bargaining with other than the exclusive representative of the Teachers and ordered the Board to cease and desist from permitting teacher employees other than MTI representatives to appear and speak at meetings of the Board on matters subject to collective bargaining. The Dane County circuit court affirmed the WERC ruling. The Wisconsin supreme court affirmed the Dane County circuit court. Three Justices dissented. Appellants motion for rehearing was denied.

Stage and manner in which federal question was presented and decided below

Prior to hearing, appellants raised by motion the question of whether the Wisconsin labor laws if applied to these facts violated the First Amendment of the United States Constitution. The WERC considered and ruled on the constitutional issue (A-App.pp. 163-4).

Appellant challenged the constitutionality of the WERC's decision in the Dane County circuit court. The circuit court decided the issue (A-App. p. 129). The constitutional problem was presented to the Wisconsin supreme court. The court considered and decided the federal constitutional issue as follows:

> "To the extent that the WERC and Circuit Court decisions in this case infringe upon the freedom to speak and to petition the federal and state governments, they are within limits imposed on the restriction of those rights by United States Supreme Court decisions and the decisions of this court." (A.App. pp. 109-10).

THE QUESTION PRESENTED IS SUBSTANTIAL

A. *It is Clear This Case Falls Within the Court's Appeal Jurisdiction.*

In the case at bar the appellants drew into question the validity of a state statute and the state court held the statute valid (28 USC 1257 (2)). The appellants initially challenged the application of Section 111.70 (3) (a) 1 & 4 Wis. Stats. (1971) to the facts of this case as invalid on federal grounds before the WERC. The WERC held the statute applicable and valid against constitutional attack. (A.App. pp. 163-4).

The appellant then challenged the constitutionality of the decision of the WERC. (A.App. p. 129). This court has made it clear that the phrase "statute of any state" encompasses every legislative action to which a state gives the force of law including the orders of state commissions which passes legislative characteristics. *Lathrop v. Dohonue* 367 US 820 (1960). There can be no doubt that the WERC decision possesses legislative characteristics essential to appeal jurisdiction. The decision prescribes future action to be taken by the board of education and, for that matter, all other public bodies when their employees wish to speak or petition at regular public meetings. (A.App. pp. 140-1).

The Wisconsin supreme court affirmed the decision of the circuit court (A.App. pp. 109, 110). The court's holding clearly sustained the validity of a state statute in the face of federal objections. It follows that an appeal pursuant 28 USC 1257 (2) lies in this case.

The decision in this case is a final decision by the highest state court of Wisconsin. *LaCrosse Telephone Corporation v. Wisconsin Board* 336 US 18 (1948).

The Wisconsin supreme court held that a federal question was properly before it and proceeded to consider and dispose of the constitutional question (A.App.pp. 109-10) Therefore, any

deficiency in the particularity with which the federal issue was framed disappears. *Saltonstall v. Saltonstall*, 276 US 260 (1927). It also follows that the federal issue was properly raised.

> "There can be no question as to the proper presentation of a federal claim when the highest court passes on it." *Raley v. Ohio* 360 US 423 (1958).

The Wisconsin supreme court held that the board of education negotiated in derogation of the rights of the exclusive bargaining representative of the teachers when it permitted Mr. Holmquist to speak. Jurisdiction via appeal is not defeated even though this Court may be called upon to review these findings of fact. This Court has indicated it will review a state courts findings of fact where the federal right has been denied as the result of a finding shown by the record to be without evidence to support it or where the conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary in order to pass on the federal question to analyze the facts. In *Napue v. Illinois*, 360 US 264 (1958), this Court referred to the long course of judicial construction which establishes as a principle that the duty rests on this court to decide for itself facts or construction upon which federal constitutional issues rest.

The appellant has standing to raise the constitutional questions presented by the WERC decision and order. Although the right to speak and p tition are personal rights the school board has sufficient personal stake in the outcome to be given standing since the board is duty bound to respect the constitutional rights of the general public and its teacher employees. *Board of Education v. Allen*, 392 US 236 (1968), *Pickering v. Board of Education*, 391 US 563 (1968). Any failure of Board members to recognize this duty and respect those rights may result in personal liability. *Wood v. Strickland*, 420 US 308 (1974). Furthermore the existence of a constitutional duty also presupposes a correlative right in the person upon whom the duty is imposed to be free from direct interference with its performance. *Brewer v. Hoxie School District* 238 F (2d) 91 (8th

Cir. 1956), *Akron Board of Education v. State Board of Education of Ohio*, 490 F (2d) 1285 (6th Cir. 1974), cert denied 417 US 932 (1974), *Board of Education v. York*, 429 F (2d) 66 (10th Cir. 1970).

In addition the board of education is the appropriate party to raise the constitutional rights of its teacher employees. It has been said that in order to have standing to litigate a constitutional question one must be asserting the right on his own behalf. But this is only a "rule of practice" which may be outweighed by the need to protect fundamental rights; that need in turn will prompt courts on grounds of broad constitutional policy to proceed without blind adherence to technical rules of representation. *Barrows v. Jackson* 346 US 249 (1953) *Smith v. Board of Education* 365 F (2d) 770 (8th Cir. 1966 Blackum J).

B. The Question Presented by the Wisconsin Supreme Court Decision is Substantial because of its impact Upon the System of Free Expression which is the Essence of Our Democratic System of Government.

This case confronts the Court again with the duty our system places on the Court to say where an individual's freedom ends and the state's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great and indispensable democratic freedoms secured by the First Amendment. That priority gives these liberties a sanctity and sanction not permitting dubious intrusions. *Thomas v. Collins* 323 US 516 (1945). The constitutional protections of speech and petition were fashioned to assure unfettered interchange of ideas *New York Times v. Sullivan* 376 US 254 (1964). Freedom of speech lies at the foundation of a free society. *Shelton v. Tucker* 364 US 479 (1960). It is the essence of self government. *Garrison v. Louisiana* 379

US 64 (1964). It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction particularly when the right is exercised in conjunction with peaceable assembly.

This court informed boards of education that their teacher employees possessed constitutional rights similar to general citizenry and reminded boards of their obligation to respect those rights in *Pickering v. Board of Education* 391 US 563 (1968).

> "To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this court." *Pickering* 391 US at 568.
>
> "It cannot be gainsaid that the state has interests as an employer in regulating the speech of its employees that differs significantly from those it possesses in connection with regulation of the citizenry in general" *Pickering* 391 US at 568.

The Wisconsin Supreme Court failed to consider the *Pickering* decision.

Furthermore, this court recently indicated that board of education members who disregard the constitutional rights of individuals may be subject to personal liability. *Wood v. Strickland* 420 US 308 (1974). The Wisconsin supreme court failed to consider the dilemma posed for board members by its decision in light of this Court's holdings in *Pickering and Wood, supra.*

In the face of the conceded fundamental importance of free expression to our democratic society, the obligation of boards of education to respect those rights of its teacher employees, and the personal risk to board members who disregard such rights, the Wisconsin supreme court affirmed an order which requires

boards of education to refuse to permit certain teacher employees the opportunity to speak and petition at regular public meetings.

The order affirmed is further suspect since it is tantamount to a prior restraint on individual employee speech on matters subject to collective bargaining. This court has consistently ruled that any system of prior restraints against expression bears a heavy burden against its constitutional validity. *United States v. Washington Post Co.* 403 US 713 (1971). The essence of forbidden censorship is content control; any restriction on expressive activity because of its content would completely undercut the profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open. *Police Dept. City of Chicago v. Mosley* 408 US 92 (1972).

This prior restraint is further complicated by the ill defined boundaries of the phrase "matters subject to collective bargaining" which prevents ready determination of legitimate from illegitimate speech or petitions. This court has insisted that statutes punishing the use of words must be carefully drawn or authoritatively construed to punish only unprotected speech and must not be susceptible of application to protected expression. *Gooding v. Wilson* 405 US 518 (1972).

C. *The Question posed by the Wisconsin Supreme Court Decision is also Substantial because the Court Misjudged the Scope of the Labor Relations Doctrine of Exclusivity as Announced by this Court in* Medo Photo Supply Corp. v. NLRB *321 US 378 (1944).*

The appellants have conceded that speech in the form of bargaining or negotiating for a labor agreement can be

constitutionally restricted to the exclusive representatives of a bargaining unit. The Wisconsin supreme court cites with approval, as establishing this principle the case of *Medo Photo Supply Corp. v. NLRB*, 321 US 378 (1944). However, the *Medo* case is of crucial importance also because the Court therein considers the type of employer activity which can properly be judged "negotiating" with other than the exclusive bargaining representative. In *Medo* the employer not only listened but conferred with dissident employees so as to arrive at a settlement on the matter of wages. The employer refused to negotiate with the exclusive representative of the employees on matters of wages, hours and working conditions. The *Medo* case stands for the proposition that negotiating with other than the exclusive representative involves more than an employer merely listening to dissident employees. Here the school board merely listened. It is a perversion of the principle of *Medo* to hold when an employer merely listens he is negotiating. The perversion of the *Medo* doctrine is more abhorrent when applied to a public body obligated to respect the constitutional rights of its employees and citizens in addition to following the dictates of the labor law.

D. *Review of the Decision is Essential Because it Affects future Activity of Every Public Body in Wisconsin.*

The impact of the decision of the Wisconsin supreme court is not limited to the City of Madison board of education. The legislative characteristics of the WERC order has impact on all 435 Wisconsin school boards, 90% of which have teacher employee organizations. Wisconsin also has 72 counties, 1270 towns, 389 villages and 186 cities all of which are also affected by this decision.

Justice Robert Hansen, in dissent, correctly sets forth the practical effect of this decision on the operation of these public bodies.

"... the difficulty of locating its (the department order) outer limits will have a chilling effect both on the right of teachers to speak and school boards to listen on topics arguably relatable to bargaining, but directly concerned with the well-being of school children and the community. The prudent school board would resolve doubts against the right of an individual teacher to speak on marginal or in-doubt topics, and that is what is meant by having a chilling effect. The writer would hold the order, in its scope and breadth, to have a constitutionally impermissible temperature-lowering effect on the exercise of First Amendment rights." (A.App. p. 123).

CONCLUSION

Probable jurisdiction of the appeal of the City of Madison Board of Education should be noted.

Respectfully submitted,

Henry A. Gempeler
City Attorney

Gerald C. Kops
Deputy City Attorney

Attorneys for Appellants
545 W. Dayton Street
Madison, Wisconsin 53703

APPENDIX

No. 410

AUGUST TERM, 1974

STATE OF WISCONSIN IN SUPREME COURT

CITY OF MADISON JOINT SCHOOL DISTRICT NO. 8, et al.
Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
Respondent,

MADISON TEACHERS, INCORPORATED,
Intervenor Respondent.

APPEAL from a judgment of the circuit court for Dane County:

WILLIAM C. SACHTJEN, Circuit Judge. *Affirmed.*

DAY, J. The question on this appeal is, was it error for the circuit court to affirm the conclusion of the Wisconsin Employment Relations Commission that the school board committed a prohibited labor practice in that it "negotiated" or "bargained" with other than the exclusive bargaining representative of the teachers on matters subject to collective bargaining when it allowed a representative of a minority group of teachers to speak at a board meeting, listened to his statements and received the results of a petition circulated by that group — all concerning matters subject to collective bargaining — when this was done at a regular public meeting of the board?

The appellant City of Madison Joint School District No. 8, including the City of Madison, Villages of Maple Bluff and Shorewood Hills, Towns of Madison, Blooming Grove, Fitchburg and Burke (hereinafter "school district") operates the

school system of said municipalities; the appellant Board of Education of the district is an agent of the district and is charged with the possession, care, control and management of the property and affairs of the school district.

The respondent Wisconsin Employment Relations Commission (hereinafter "WERC") is an administrative body charged with the responsibility of administering statutory policy with respect to both public and private employees.

Madison Teachers, Incorporated (hereinafter "MTI"), intervenor respondent, is a labor organization which was, at the time of the events which give rise to this action, the exclusive majority collective bargaining representative of the teachers of the district.

The Board of Education (board) and MTI were, for the calendar year 1971, parties to a collective bargaining agreement covering wages, hours, and conditions of employment for all bargaining unit personnel, which included all teachers. The agreement terminated on December 31, 1971. Negotiations for a successor agreement began almost as soon as the previous one concluded. Thus, on January 25, 1971, MTI submitted a proposal for a new contract to take effect January 1, 1972. This proposal contained a "fair share" provision, a contractual requirement that all teachers, including those not then members, pay full union dues, *i.e.*, their "fair share" of the costs of collective bargaining.

Such a provision was proposed by MTI the previous year and was rejected by the board. This fair-share provision was discussed throughout the 1971 negotiations and at all times was opposed by the board. Initially, the board objected because such a provision was then illegal. There were frequent requests by the board for MTI to defer fair share for another year.

On November 11, 1971, legislation (ch. 124, Laws of 1971) became effective which allowed inclusion of a fair-share provision in municipal-employee collective-bargaining agreements. This is now codified as sec. 111.70 (1), Stats., and defined in sec. 111.70 (1) (h). Soon thereafter MTI submitted another fair-share proposal to conform to the new law; again it was rejected by the board.

The number of unresolved issues between the parties had been reduced to about 13 by November, 1971. Two of these were considered of overriding importance by both sides: (1) the fair-share provision, and (2) the provision for binding arbitration of non-renewal of teacher contracts and teacher dismissals. The board had opposed both of these issues throughout the negotiations. However, in late October or early November, the chairman of the board's negotiating team indicated, informally and unofficially, to the chairman of MTI's negotiating team that there was "no way" arbitration for dismissals and non-renewals would be accepted by the board, but there was a "distinct possibility" the fair-share provision could be accepted. He said two members of the board said they would approve fair share if MTI would withdraw its arbitration proposal.

On the other hand, at the WERC hearing in this case, the chairman of MTI's negotiating team testified that the union's bargaining strategy was to lead the board to believe that MTI's primary interest was in fair share when in fact it was in arbitration. If this strategem were successful, MTI could at some point offer to "sacrifice" fair share for arbitration and celebrate the result.

On November 14, 1971, Ralph Reed and Albert Holmquist, teachers employed by the district, neither of whom were members of MTI, sent a letter opposing the fair-share provision, which they considered a denial of freedom of choice, to all teachers employed by the district. The letter solicited responses

and 200 were received, the majority sympathetic to their position. A meeting of some of these teachers was scheduled for December 2, 1971. Fourteen teachers attended, half of whom were MTI members. They prepared a petition and formulated plans for circulating it in the schools on December 6, 1971. The petition supported a one-year deferral of consideration of fair share. It was intended to present the results of the petition to both MTI and the board at the board's regular public meeting on the evening of December 6, 1971. The petition was circulated in the schools, in non-working areas on non-working time, that day and a letter, also urging deferral of fair share, was distributed to the teachers of two schools through their school mailboxes. The principals of those two schools, agents of the board, knew of the latter activity.

By December 6, 1971, negotiations between the board and MTI had reached an impasse. For the board's regular public meeting that evening MTI had arranged to have pickets present and 300-400 teachers in attendance at the auditorium. MTI's representative John Mathews knew in advance that Messrs. Reed and Holmquist intended to present the results of their petition and speak to the board against fair share. He encountered Mr. Holmquist and Mr. Reed in the auditorium before the meeting was to begin and tried to talk them out of presenting the petition or speaking to the board.

Soon thereafter, Mr. Mathews met a member of the board, Mr. Yelinek, outside. He informed Mr. Yelinek of what Messrs. Reed and Holmquist intended to do that evening and also showed him underlined portions of the *Board of Sch. Directors of Milwaukee v. WERC* (1969), 42 Wis. 2d 637, 168 N.W. 2d 92. Mr. Yelinek responded that he "would take care of it."

Mr. Mathews met Messrs. Reed and Holmquist again, soon after talking with Mr. Yelinek. He again tried, unsuccessfully, to talk them out of presenting the petition and speaking to the

board, telling them that the negotiations were delicate and urging them to refrain "or we were going to lose the whole ball game."

At the board meeting, a portion of time was devoted to public appearances. Mr. Holmquist completed a registration form stating that he wished to speak during this period. He did not say on this form what he wished to speak about. Several individuals spoke during this time and then the president of MTI rose and spoke. At the conclusion of his remarks he presented to the board a statement signed by 1300 to 1400 teachers, declaring "We, the undersigned wish the parties to resume negotiations and reach agreement as quickly as possible."

Immediately following this speaker, Mr. Holmquist was allowed to speak. He said

> " 'My name is Albert Holmquist. I reside at 5626 Crestwood Place. I am another teacher. I represent an informal committee of 72 teachers in 49 schools. I would like to inform the Madison Board of Education, as I already have the Madison Teachers, Incorporated, about the results of an informational survey regarding one of the thirteen or so items now on the conference table and one of the main items that will certainly be included in some form in the new package.' "

He then read the petition:

> " 'To: Madison Board of Education, Madison Teachers, Incorporated. We the undersigned ask that the fair-share proposal (agency shop) being negotiated by Madison Teachers, Incorporated and the Madison Board of Education be deferred this year. We propose the following: 1) The fair-share concept being negotiated be thoroughly studied by an impartial committee composed of representatives from all concerned groups. 2) The findings of this study be made public. 3) This impartial committee will ballot (written) all persons affected by the contract agreement for their opinion on the fair share proposal. 4) The results of this written ballot be made public.' "

He added:

> " 'We feel this study necessary because neither the board's negotiators who have placed entirely too much emphasis on this one point nor Madison Teachers, Inc. which speaks euphemistically about the "whole package" and therefore is not issue specific ... Neither has properly addressed the serious issue of fair-share and agency shop. We find much confusion in the proposal as it stands and even more on the part of teachers' interpretations of it.
>
> For evidence, 417 teachers from the 31 schools which represents 53% of the total number of these faculties of these schools ... who have called in to this hour have signed the petition on the first day it was taken into their schools. Due to this confusion, we wish to take no stand on the propsal itself, but ask only that all alternatives be presented clearly to all teachers and more importantly to the general public to whom we are all responsible. We ask simply for communication, not confrontation.' "

When he finished, the board president asked Mr. Holmquist whether he intended to communicate the petitions to the board. Mr. Holmquist replied that he did; the petitions, however, were never presented to the board. There was no other exchange between Mr. Holmquist and any member of the board.

After the public meeting, the board went into executive session and considered the unresolved collective-bargaining issues, since a negotiation session had been scheduled for the following day, December 7, 1971. The board adopted the following resolution:

> " 'It was moved and seconded to accept the total package as presented including arbitration for dismissal of non-probationary teachers and *not* including agency shop; if the MTI does not accept this as a total package, the offer of arbitration is withdrawn.' " (Emphasis the board's.)

At the next day's negotiations, the board's representatives opened the meeting with the above-quoted resolution and said,

"... This is the deal." After some discussion, MTI conceded and tentative agreement was reached. The final agreement was signed December 14, 1971, with no fair-share provision, but with the arbitration provision.

In January, 1972, MTI filed a complaint with WERC alleging that the board committed a prohibited labor practice when it listened to Mr. Holmquist at its public meeting; this was said to constitute prohibited negotiating with other than the official, exclusive collective-bargaining representative, MTI. The board denied the charge. A hearing was held on February 28, 1972. On September 13, 1972, WERC concluded that the board had committed the alleged prohibited labor practices and ordered the board to cease and desist from the same.

The board petitioned the Dane county circuit court for review under ch. 227, Stats. MTI intervened. On October 2, 1973, the court entered its written decision affirming the WERC conclusion and order. Judgment affirming WERC and dismissing the petition for review was entered October 17, 1973. The board appeals from that judgment.

The basic question on the appeal is, did the board commit an unfair labor practice under the fact situation outlined above? In addition, other questions have been raised on issues of constitutionality and statutory construction.

It could be argued that as a matter of policy the board should hear not only the majority union, but any minority union groups or ad hoc committee representatives to thereby get a cross-section of all views and ascertain what all employees think of the various issues subject to collective bargaining. Under such an argument the board and its bargaining representatives should listen to and exchange ideas with all these various groups and factions within a collective bargaining unit. But that is not how collective bargaining is to be carried out under our law.

This court has held that the majority organization in a particular labor bargaining unit is, under the Municipal Employment Relation Act (MERA), sec. 111.70, Stats., not only the bargaining representative for the members of that majority organization, but is the exclusive bargaining representative of all the employees, members or non-members, of the bargaining unit. *Board of Sch. Directors of Milwaukee v. WERC, supra,* at 645-647. *Accord, Board of Education v. WERC* (1971), 52 Wis. 2d 625, 191 N.W. 2d 242. The statute also states that it is a prohibited labor practice for a municipal employer to refuse to bargain collectively with this exclusive majority representative. Sec. 111.70 (3) (a) 4, Stats. Further, it is a prohibited labor practice for the municipal employer "To interfere with, restrain or coerce municipal employes in the exercise of their rights ...," sec. 111.70 (3) (a) 1, one of which is the right "... to bargain collectively through representatives of their own choosing ...," sec. 111.70 (2). In this case, WERC concluded that the board, in allowing Mr. Holmquist to speak and in listening to his statement and his oral presentation of the results of his petition, had committed prohibited labor practices in violation of sec. 111.70 (3) (a) 1 and 4, in that it had violated its duty to bargain in good faith with MTI and had interfered with the rights of employees represented by MTI to bargain collectively through representatives of their own choosing. On this basis, WERC ordered, *inter alia*, that the board:

> "1. Shall immediately cease and desist from permitting employes, other than representatives of Madison Teachers Inc., to appear and speak at meetings of the Board of Education, on matters subject to collective bargaining between it and Madison Teachers Inc."

The WERC decision was affirmed by the circuit court.

The basic question here is whether or not the activities of the board at its public meeting constituted bargaining. The board of education in its brief concedes that bargaining by a minority group of employees with the board is prohibited by our law. In its brief the board states:

> "It may well be because of the public interest in stable labor relations permissible to restrict the rights of a minority group or individual teacher to negotiate with their employer. However, we submit to prevent an employee from providing information to his employer orally is beyond the scope of permissible restriction of the Constitutional rights of public employees to speak and petition their government."...
>
> The Board of Education does not contest the assertion that it has an obligation to bargain exclusively with the majority representative of its employees or that a 'fair share' agreement is a matter of mandatory bargaining."

The United States/[1] and Wisconsin/[2] Constitutions protect the rights of individuals to speak and to petition their federal and state governments. But it is well established that these

---

/[1]The First and Fourteenth Amendments to the United States Constitution, in pertinent part, are:

> "Article I.
>
> Congress shall make no law ... abridging the freedom of speech ... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
>
> "Article XIV.
>
> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

/[2]The Wisconsin Constitution provides, in pertinent part, in Article I, Sections 3 and 4:

> "Free speech; libel. Section 3. Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech ..."
>
> "Right to assemble and petition. Section 4. The right of the people peaceably to assemble, to consult for the common good, and to petition the government, or any department thereof, shall never be abridged."

freedoms are not absolute./3 To the extent that the WERC and circuit court decisions in this case infringe upon the freedom to speak and to petition the federal and state governments, they are within the limits imposed on the restriction of those rights by United States Supreme Court decisions and the decisions of this court. What is required to overcome the constitutional prosecriptions on abridgement of these rights has been variously described as "... a clear and present danger that [the speech] will bring about the substantive evils that [the legislature] has a right to prevent," *Schenck v. United States* (1919), 249 U.S. 47, 52, 39 Sup. Ct. 247, 63 L.Ed. 470, or "... grave and immediate danger to interests which the State may lawfully protect," *West Virginia St. Brd. of Educ. v. Barnette* (1943), 319 U.S. 624, 639, 63 Sup. Ct. 1178, 87 L.Ed. 1628. Somewhat more recently the court has refined this language into a balancing test:

> " 'In each case [courts] must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' " *Dennis v. United States* (1951), 341 U.S. 494, 510, 71 Sup. Ct. 857, 95 L.Ed. 1137.

This question has been answered by this court and the United States Supreme Court in the field of labor negotiations. In *Board of Sch. Directors of Milwaukee v. WERC, supra*, this court recognized the right of the certified majority union to exclusive negotiating rights with the employer. *Accord, Board of Education v. WERC* (1971), 52 Wis. 2d 625, 633, 191 N.W. 2d 242. The principle of exclusivity, by definition, forbids certain individuals from speaking certain things in certain contexts; the

---

[3] *State v. Becker* (1971), 51 Wis. 2d 659, 664, 188 N.W. 2d 449; *State ex rel. Gall v. Wittig* (1969), 42 Wis. 2d 595, 606, 167 N.W. 2d 577; *State v. Zwicker* (1969), 41 Wis. 2d 497, 509-510, 164 N.W. 2d 512; *State v. Givens* (1965), 28 Wis. 2d 109, 118, 135 N.W. 2d 780.

First Amendment rights of those persons are, to that extent, thereby infringed. But the gravity of that evil was considered outweighed by the necessity to avoid the dangers attendant upon relative chaos in labor-management relations.

> "The federal labor laws seek to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining .... The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit." *Vaca v. Sipes* (1967), 386 U.S. 171, 182, 87 Sup. Ct. 903, 17 L.Ed. 2d 842; *cf., Medo Photo Supply Corp. v. NLRB* (1944), 321 U.S. 678, 684, 64 Sup. Ct. 830, 88 L.Ed. 1007; *accord, Texaco, Inc. v. N.L.R.B.* (7th Cir. 1971), 436 Fed. 2d 520, 524.

The question of whether speech in the form of bargaining or negotiating for a labor agreement can be constitutionally restricted to representatives of the majority bargaining unit has been answered in the affirmative. None of the parties to this action disputes that. Now the question is whether the activity herein complained of by MTI, and subsequently prosecribed by WERC, qualifies as bargaining and can, therefore, be restricted under the rule of *Board of Sch. Directors of Milwaukee v. WERC, supra*. In that case, Justice Hanley speaking for a majority of this court defined "negotiating" as follows, p. 652:

> "Quite obviously, the determination of this issue turns on the interpretation given to 'negotiating.'
>
> 'Negotiate' is defined in Webster's New International Dictionary (3d 3d.) as:
>
> '... 1: to communicate or confer with another so as to arrive at the settlement of some matter: meet with another so as to arrive through discussion at some kind of agreement or compromise about something: come to terms esp. in state matters by meetings and discussions ....' "

In that case, the school board and the majority union were in the midst of negotiations on a new contract. At a public meeting of one of the committees of the school board, a representative of the minority union rose to speak on a matter which was a subject of negotiations. He was denied the right to speak. WERC considered this denial a prohibited practice. The circuit court reversed the WERC decision and was affirmed by this court; this court finding, in effect, that allowing the minority representative to speak on that subject would have constituted prohibited negotiating or bargaining with him. This court had to determine the interpretation to be given to "negotiating" and relied on the definition cited above. This court placed emphasis on the statutory requirement that no final action should be taken on such negotiated matters until they are made public and discussed in an open public meeting./[4] The court said that such "... open meeting is the necessary and final step in the 'negotiation' process between the school board and the majority teachers' union." *Board of Sch. Directors of Milwaukee v. WERC, supra*, at p. 653. Thus, it seems the court considered the school board committee meeting in that case to be a part of the "negotiation process." With the impasse that had been reached in the negotiations in the case before us with the majority union, with several members present at the board meeting, with its pickets present, and its representatives addressing the board on subjects of the collective bargaining negotiations, that meeting certainly was part of the negotiation process. The board relies heavily on the statement made by this court in that case, in which this court said:

---

[4] '" '. . . the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental affairs and the transaction of governmental business.' " Sec. 14.90 (1), Stats. (1967), renumbered as sec. 66.77 (1), Stats. (1973). *See, Board of Sch. Directors of Milwaukee v. WERC, supra*, at p. 650.

> "If this case involved solely the giving of a position statement at an ordinary meeting of a public body, we would have some difficulty in labeling the conduct 'negotiating.' " 42 Wis. 2d at p. 652.

What was said in the case before us goes beyond the mere giving of a "position statement" because here the statement went to the very heart of the negotiations.

As the trial court in this case pointed out in its analysis of the facts:

> "In November, 1971, a Mr. Holmquist and a Mr. Reed, both of whom are teachers employed by the school board and both of whom are not members of MTI, drafted a letter addressed to 'Dear Fellow Madisonian Educator.' Such letter, headed 'E.C. — O.L.O.G.Y.,' meaning 'Educator's Choice — Obligatory Leadership Or Goverance by You,' asked the addressee to 'Save Freedom of Choice' and stated that 'A Closed Shop (agency shop) Removes This Freedom.' The bottom portion of such letter was in the form of a ballot allowing the addressee to express his opposition to 'agency Shop.' Said letter was mailed on November 14, 1971, to all teachers in the Madison Public School system by Holmquist and Reed. Approximately two hundred replies to such letter were received, the majority of which were favorable to their position on fair share. . . .
>
> Mr. Holmquist appeared at the board meeting held on December 6, 1971, and he was permitted to speak to the board. . . .
>
> Even though Holmquist's statement superficially appears to be merely a 'position statement,' the court deems from the total circumstances that it constituted 'negotiating.' The court in *Board of School Directors, supra*, at page 653 stated:
>
> 'On the other hand, if the minority union representative is permitted to influence the decision of the school board by his argument, then he is truly "negotiating." '
>
> In the case at bar, Holmquist in fact desired to have the fair-share proposal deleted from the agreement. . . ."

We agree with the trial court that this was in fact negotiating and one need only read the Holmquist statement to see that the "information" that was being imparted was a request that the whole fair-share issue be deferred along with a counter proposal as to how the issue should be handled for possible future consideration. It also criticized MTI's handling of the negotiations in this respect.

The statement given by Mr. Holmquist was more than a mere statement of a position; it was an argument for it. Furthermore, though Mr. Holmquist was not speaking for a minority union, as in the case of *Board of Sch. Directors of Milwaukee*, it is obvious he was speaking for an *ad hoc* group which was opposed to including a fair-share agreement in any contract being negotiated at that time.

The board also argues that the WERC order must be invalidated because it is vague; if fails to provide adequate guidelines for compliance with its terms. The WERC order directs the board to cease and desist from permitting employees, other than the representatives of MTI, from appearing and speaking at meetings of the board on matters subject to collective bargaining. Matters subject to collective bargaining, as opposed to subjects reserved to management, are defined as "wages, hours and conditions of employment" Sec. 111.70(1)(d), Stats. The board argues that "conditions of employment" is constitutionally vague and, thus, the order must be voided.

The board, however, has no standing to raise the question. It has conceded in its brief and at oral argument that the matter spoken of by Mr. Holmquist before the board was a subject of collective bargaining. Thus, whatever the vagaries of the WERC order as it may or may not affect others, it is both a plain fact and conceded by the board that there is no vagueness in that order as it affects the board's conduct here.

> "... even if the outermost boundaries of [the prohibition] may be imprecise, any such uncertainty has little relevance here, where appellants' conduct falls squarely within the 'hard core' of the ... proscriptions ...." *Broadrick v. Oklahoma* (1973), 413 U.S. 601, 608, 93 Sup. Ct. 2908, 37 L.Ed. 2d 830. *Accord, Paulos v. Breier* (7th Cir. 1974), 507 Fed. 2d 1383, 1387, 1388; *Driscoll v. Schmidt* (W.D. Wis. 1973), 354 Fed. Supp. 1225, 1229.

The law is clear that "(o)ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy* (1974), 417 U.S. 733, 94 Sup. Ct. 2547, 2562, 41 L.Ed. 2d 439. The board has no standing to raise the vagueness claim.

Furthermore, "wages, hours and conditions of employment" is the phrase commonly used to describe what are subjects of collective bargaining. It is used in the NLRA, 29 USC secs. 152 (9) and 159 (a). Certainly, "(w)ords inevitably contain germs of uncertainty ...," *Broadrick v. Okla., supra*, at p. 608, but the test to avoid unconstitutional vagueness does not require crystal clarity:

> "There might be quibbles about the meaning of [certain language]; but there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." *United States Civil Service Commission v. Nat'l Assoc. of Letter Carriers, — AFL-CIO* (1973), 413 U.S. 548, 577-578, 579, 93 Sup. Ct. 2880, 37 L.Ed. 2d 796. *See also, Weber v. State* (1973), 59 Wis. 2d 371, 382, 208 N.W. 2d 396.

We conclude the order of the Wisconsin Employment Relations Commission of September 13, 1972, is not vague.

By the Court. — Judgment affirmed.

No. 410

August Term, 1974

STATE OF WISCONSIN: IN SUPREME COURT

CITY OF MADISON, JT. SCHOOL DIST. NO. 8, et al.,
Appellants,

v.

WIS. EMPLOYMENT RELATIONS COMMISSION,
Respondent,

MADISON TEACHERS, INC.,
Intervenor-Respondent.

ROBERT W. HANSEN, J. *(dissenting).* What is wrong with holding that only the spokesman for the designated bargaining agent of the teachers may speak on employment-related school matters at a public meeting of a public school board? What is wrong is that it denies the constitutional assurances as to freedom of speech and petition to individual school teachers and other teacher groups.

The First Amendment to the United States Constitution guarantees that "Congress shall make no law ... abridging the freedom of speech ... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."/[1] The Wisconsin Constitution assures the right of every person to "... freely speak, write and publish his

---

/[1]Amendments to the United States Constitution, art. I, made applicable to states by the "due process" clause of the Fourteenth Amendment. *See: Joseph Burstyn, Inc. v. Wilson* (1952), 343 U.S. 495, 72 Sup. Ct. 777, 96 L.Ed. 1098. *See also: Lawson v. Housing Authority of Milwaukee* (1955), 270 Wis. 269, 70 N.W. 2d 605, recognizing such applicability.

sentiments on all subjects ..." and to "... petition the government or any department thereof...."/[2] The United States Supreme Court has made clear that as a constitutional matter teachers may not be "... compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work...."/[3] These constitutional guarantees protect all citizens, public school teachers included, with the nature of the teaching profession bringing "... the safeguards of those amendments vividly into operation."/[4]

/[2]Wisconsin Constitution, art. I, sec. 3 providing: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to retrain or abridge the liberty of speech or of the press. ..." And, art. 1, sec. 4, providing: "The right of the people peaceably to assemble, to consult for the common good, and to petition the government, or any department thereof, shall never be abridged."

/[3]*Pickering v. Board of Education* (1968), 391 U.S. 563, 568, 88 Sup. Ct. 1731, 20 L.Ed. 2d 811.

/[4]*See: Wieman v. Updegraff* (1952), 344 U.S. 183, 73 Sup. Ct. 215, 97 L.Ed. 216, Mr. JUSTICE FRANKFURTER in concurring opinion (page 195) stating: "By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice...."

We deal here with the right of a teacher to speak at a public meeting of a school board on school matters — during the portion of such meeting set aside for appearances by the general public. /5. During such citizens-invited-to-present-points-of-view part of the meeting, the president of the teachers' association that was the sole collective bargaining agent spoke for a fair-share proposal,/6 and presented a petition or statement signed by between thirteen and fourteen hundred teachers urging continued negotiations and early agreement. Then an individual teacher requested permission to speak, without indicating what he intended to talk about. Given such permission, he stated that he represented "... an informal committee of 72 teachers in 49 schools," urged further study of the fair-share proposal and stated he would submit a petition signed by teachers who favored delay for study. The school board permitted both the association president and the committee spokesman to speak and listened to both when they spoke.

The state employment relations board found that the Madison school board, by listening to the teacher who spoke after the president of the teachers' association had concluded his remarks, had committed a "prohibited practice" in violation of

---

/5The meeting involved was the regular and scheduled meeting of the board of education of the city of Madison, joint school district No. 8, on the evening of December 6, 1971. A portion of each regular meeting of this board is opened and devoted to appearances by the public, permitting concerned citizens to present their points of view on school matters to the board.

/6Sec. 111.70 (2), Stats., provides the procedure by which a union security agreement designated "fair share" may be established or terminated.

sec. 111.70 (3) (a) (1) and (4), Stats./7 The employment relations board ordered the school board to "... immediately cease and desist from permitting employes, other than representatives of Madison Teachers Inc., to appear and speak at meetings of the Board of Education, on matters subject to collective bargaining...." The circuit court upheld such order, and the majority of our court affirms.

The writer sees three constitutional infirmities in the employment relations board's order, all related to the First Amendment and the corollary state constitutional guarantees as to freedom of speech and right to petition for redress of grievances.

THE RIGHT TO SPEAK. When a school board sets aside a portion of its regular meeting as a public forum where citizens generally may state their views on school matters, the invitation and the right to appear go to all citizens, teachers included. The school board is a public body. The meetings are public meetings. Its open discussion periods are just that — open to the public, teachers included. The majority opinion finds the exclusion of teachers or teacher groups, other than the one designated as collective bargaining agent, was here justified and required by the State Municipal Employment Relations Act, which provides for an exclusive bargaining representative for an appropriate

---

/7Sec. 111.70 (3) (a) (1), Stats., provides that it is a prohibited practice for a municipal employer "... (1) To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2)." Sub. (2) provides that it is a prohibited practice "... (2) To initiate, create, dominate or interfere with the formation or administration of any labor or employe organization...." Sub. (4) provides that it is a prohibited practice "... (4) To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. . . ."

bargaining unit./[8] As to an individual's right to speak at a public hearing or a public meeting of a public body, we would see any duties or rights deriving from the Employment Relations Act as limited by rights granted by our constitutions, federal and state. If there is a crunch, it is the statute, not the constitutional right, that must yield. However, in the situation before us, the writer sees no crunch or conflict. The association or union, selected as the bargaining agent for the employees, is the sole bargaining representative of the employees in bargaining sessions between employer and such bargaining agent. These meetings are not public. What the group, selected as sole bargaining agent in the election to select such representative, won was the right to represent the employees in the bargaining unit in bargaining sessions and negotiations with the employer. What it did not win was the right to speak, during a public discussion period, at a public meeting of a public body, with all other voices of individual teachers or groups of teachers to be silenced. The school board here is not required to conduct public discussion periods at its meetings while collective bargaining is going on. It is not required, the writer thinks, to hear any discussion of stated and specified topics or issues that are involved in the collective bargaining negotiations between it and the designated collective bargaining agent. But what it cannot do, much less be required to do, is to permit the representative of the employees for bargaining purposes to speak at a public meeting while a gag is placed over the mouths of all individual teachers or other teacher group representatives. This sauce of right to speak at a public meeting cannot be served to one, without being available to the others. It is true that, as to the right of a minority union to speak at a committee meeting dealing with matters involved in collective bargaining negotiations, this court did deny the right

---

[8]Subch. IV, secs. 111.70 to 111.77, Stats., the Municipal Employment Relations Act.

of minority unions to be heard at such meeting./[9] However, in that case, our court held: "If this case involved solely the giving of a position statement at an ordinary meeting of a public body, we would have some difficulty in labeling the conduct 'negotiating' "/[10] In the case now before us we do have "... solely the giving of a position statement at an ordinary meeting of a public body."/[11] Restrictions as to length, relevancy or to "giving of a position statement" raise no constitutional questions. They are all implicit in an invitation to appear at a public discussion at a public meeting of a public board. The writer has no quarrel with the Milwaukee case, as limited. However, the writer sees the exclusivity of bargaining representation in employer-employee relations as not here reaching or including the right of the designated representative to speak at a public forum portion of a school board meeting, with all other teacher voices to be silenced. Actually, the employment relations board order does not deny the right of the individual teacher to speak. It only denies the right of the school board to listen. But the right to speak with no one to listen is hardly what the constitutional guarantees envision or protect. The writer, under these circumstances, sees the right of the teacher to speak and the school board to listen as alike constitutionally protected.

---

[9]*Board of School Directors of Milwaukee v. WERC* (1969), 42 Wis. 2d 637, 168 N.W. 2d 92. *See also: Board of Education v. WERC* (1971), 52 Wis. 2d 625, 191 N.W. 2d 242.

[10]*Id.* at page 652.

[11]The teacher whose right to speak is here challenged also stated that he intended to present a petition signed by teachers in the school system. However, the order of the employment relations board holds only that permitting the teacher to speak exceeded the bounds of permissible conduct, apparently conceding that sec. 111.70 (2), Stats., authorizes and requires a municipal employer to receive a petition of employees as to a fair-share agreement.

CENSORSHIP OF CONTENT. As to the brief presentation here made by the individual teacher and spokesman for the informal teachers' committee, the majority finds it to have been "... more than a mere statement of a position; it was an argument for it." Unless a speaker takes a firm stand on both sides of the fence, it is difficult to see where a statement of position would not be for or against a proposal or proposition. Here the teacher who spoke identified himself and then read the text of the petition being circulated which he stated would be filed with the board. The petition asked study by an impartial committee. If this was argumentative, it was only mildly so. But the issue as to content of what was or might be said goes deeper. The majority defends the employment relations board order against the charge of vagueness. It finds no vagueness in the board order as it affects "... the boards conduct here." That is certainly true, but, in the First Amendment context, the question of scope or uncertainty as to future application goes to the chilling effect of the order upon the right of free speech. The employment relations board concluded that, when a teacher asks to speak to the board during a public discussion period at a regular board meeting, the board must inquire as to the nature of the speech. Then, if the topic is a matter subject to collective bargaining, the board must refuse to allow the teacher to speak. What matters are subject to collective bargaining? The statute provides that a municipal employer must bargain in good faith on matters of wages, hours and working conditions./[12] As appellant suggests, certain questions arise. Suppose the teacher wishes to speak on class size or teachers' aides, the establishment of summer programs, school

/[12]Sec. 111.70 (1) (d), Stats., provides: " 'Collective bargaining' means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employes, to meet and confer at reasonable times, in good faith, *with respect to wages, hours and conditions of employment....*" [Emphasis supplied.]

reading projects, in-service training, or the special treatment and handling of problem students. Are these matters subject to collective bargaining on which the board is restricted from receiving information from teachers other than the majority representative of its employees? Nothing in the Municipal Employment Relations Act suggests that a teacher does not have a right to speak at a public meeting on these matters, yet all could be covered or affected by a collective bargaining agreement. It is in this sense that the department order is vague, not meaning that it cannot be understood and applied by this school board to the facts here, but because the difficulty of locating its outer limits will have a chilling effect both on the right of teachers to speak and school boards to listen on topics, arguably relatable to bargaining, but directly concerned with the well-being of school children and the community. The prudent school board would resolve doubts against the right of an individual teacher to speak on marginal or in-doubt topics, and that is what is meant by having a chilling effect. The writer would hold the order, in its scope and breadth, to have a constitutionally impermissible temperature-lowering effect on the exercise of First Amendment rights.

JUSTIFICATION FOR INFRINGEMENT. The majority opinion sets forth the federal and state constitutional guarantees of the rights of individuals to speak and to petition government for redress of grievances. It then concedes: "There can be no doubt that the WERC and circuit court decisions in this case infringe upon thse protected freedoms." Such infringement of a constitutional right, the majority writes and the writer agrees, may be permitted where there is a "... grave and immediate danger to interests which the State may lawfully protect./[13] The question is whether the gravity of the dangers

/[13]*West Virginia State Board of Education v. Barnette* (1943), 319 U.S. 624, 639, 63 Sup. Ct. 1178, 87 L.Ed. 1628. (Quoted in majority opinion.)

justifies the admitted infringement./[14] In the case before us, the majority holds, the gravity of infringing upon two rights, assured by federal and state constitutions, is "... considered outweighed by the necessity to avoid the dangers attendant upon relative chaos in labor-management relations." The employment relations board was more restrained, seeing two "salutary purposes" served by its order — *i.e.*, it "stabilizes the bargaining relations" and it serves the "unity of collective clout" which "advances the welfare of public employes." How can either statement of the public purpose served withstand the obvious fact that the danger alluded to could be entirely avoided by permitting no discussion at a public appearance portion of a regular school board meeting — by anybody — of specified topics and areas of discussion, announced and stated in advance of the public meeting. That would avoid treating a public meeting of a public body both as a collective bargaining session and as an opportunity for presentation of points of view by members of the public with only individual teachers silenced and not permitted to speak. Even if this individual teacher, speaking for himself or for his informal committee, were permitted to state his or their position during a public discussion period at a regular school board meeting, could grave danger, much less "chaos," be a likely or reasonably predictable result? This is no "shouting Fire in a crowded theater" situation. Any conflict between exclusivity in bargaining and the teachers' rights of free speech can be here entirely avoided by advance listing of topics that no one may discuss during the public-invited period of the school board meeting. The writer sees no reason here for holding that anyone except an individual school teacher or minority teacher group may speak freely on school affairs at a school board meeting. Town meeting type discussions at school board

---

/[14] *Dennis v. United States* (1951), 341 U.S. 494, 510, 71 Sup. Ct. 857, 95 L.Ed. 1137. (Quoted in majority opinion.)

meetings are in the American tradition, but town meetings were open to everyone, not everyone except school teachers. Freedom of speech "... lies at the foundation of a free society,"/[15] and "... speech concerning public affairs is more than self-expression; it is the essence of self-government."/[16] The writer would reverse. As to teacher participation in a public discussion at a public meeting of a public body, the writer finds here no showing of facts present or danger threatened that either requires or warrants denying this teacher and any other teacher so situated, "... the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work...."/[17]

I am authorized to state that Mr. Justice Bruce F. Beilfus and Mr. Justice Connor T. Hansen join in this dissent.

/[15] *Shelton v. Tucker* (1960), 364 U.S. 479, 486, 81 Sup. Ct. 247, 5 L.Ed. 2d 231.

/[16] *Garrison v. Louisiana* (1964), 379 U.S. 64, 74, 75, 85 Sup. Ct. 209, 13 L.Ed. 2d 125.

/[17] *Pickering v. Board of Education, supra*, footnote 3, at page 568.

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

#137-382

CITY OF MADISON, JOINT SCHOOL DISTRICT NO. 8 et al

Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent,

MADISON TEACHERS INCORPORATED,

Intervenor Respondent.

MEMORANDUM DECISION

The petitioner in this action pursuant to Chapter 227, Stats., seeks review of a decision and order of the Wisconsin Employment Relations Commission dated September 13, 1972, which determined that said petitioner had committed unfair practices prohibited by sec. 111.70 (3) (a) 1 and 4.of the Municipal Employment Relations Act.

The petitioner (hereinafter "school board") and Madison Teachers, Inc. (hereinafter "MTI") were parties to a labor agreement covering teachers and other employees, which ran from January 1, 1971, to December 31, 1971. Said agreement contained, inter alia, a provision that the school board would bargain exclusively with MTI.

On January 25, 1971. MTI gave the school board timely notice of its desire to modify the existing agreement for the year 1972. Conferences and negotiations between the parties for a successor agreement continued during the year until October 4, 1971. By November, 1971, two primary issues remained unresolved, viz., a fair share agreement and binding arbitration of teacher nonrenewals and dismissals.

In November, 1971, a Mr. Holmquist and a Mr. Reed, both of whom are teachers employed by the school board and both of whom are not members of MTI, drafted a letter addressed to "Dear Fellow Madisonian Educator." Such letter, headed "E.C. — O.L.O.G.Y.," meaning "Educator's Choice — Obligatory Leadership Or Goverance by You," asked the addressee to "Save Freedom of Choice" and stated that "A Closed Shop (agency shop) Removes This Freedom." The bottom portion of such letter was in the form of a ballot allowing the addressee to express his opposition to "agency shop." Said letter was mailed on November 14, 1971, to all teachers in the Madison Public School system by Holmquist and Reed. Approximately two hundred replies to such letter were received, the majority of which were favorable to their position on fair share.

On December 2, 1971, a meeting of 14 teachers who wished to work against any fair share agreement resulted in a memorandum entitled "Points of Information" and a petition which were distributed to the teachers employed by the School District.

Prior to the December 6, 1971, school board meeting, Mr. Keith Yelinek, a member of the board, was informed that individuals other than authorized agents of MTI intended to speak at such meeting on fair share. Mr. Yelinek was presented with copies of the court's decision in *Board of School Directors of Milwaukee v. W.E.R.C.*, 42 Wis. 2d 637 (1968), and he indicated he would relate such information to the board.

Mr. Holmquist appeared at the board meeting held on December 6, 1971, and he was permitted to speak to the board. Mr. Holmquist prefaced his remarks to the board by stating:

> "My name is Albert Holmquist. I reside at 5626 Crestwood Place. I am another teacher. I represent an informal committee of 72 teachers in 49 schools. I would like to inform the Madison Board of Education, as I already have the Madison Teachers Incorporated, about the results of an

informational survey regarding one of the thirteen or so items now on the conference table and one of the main items that will certainly be included in some form in the new package."

He then read to the board the text of a petition he had circulated among bargaining unit teachers dated December 6, 1971. In so doing, he stated as follows:

"To: Madison Board of Education, Madison Teachers Incorporated. We the undersigned ask that the fair-share proposal (agency shop) being negotiated by Madison Teachers Incorporated and the Madison Board of Education be deferred this year. We propose the following: 1) The fair-share concept being negotiated be thoroughly studied by an impartial committee composed of representatives from all concerned groups. 2) The findings of this study be made public. 3) This impartial committee will ballot (written) all persons affected by the contract agreement for their opinion on the fair share proposal. 4) The results of this written ballot be made public.

"We feel this study necessary because neither the board's negotiators who have placed entirely too much emphasis on this one point nor Madison Teachers, Inc. which speaks euphemistically about the 'whole package' and therefore is not issue specific.... Neither has properly addressed the serious issue of fair share and agency shop. We find much confusion in the proposal as it stands and even more on the part of teachers' interpretations of it. For evidence, 417 teachers from the 31 schools which represents 53% of the total number of these faculties of these schools ... who have called in to this hour have signed the petition on the first day it was taken into their schools. Due to this confusion, we wish to take no stand on the proposal itself, but ask only that all alternatives be presented clearly to all teachers and more importantly to the general public to whom we are all responsible. We ask simply for communication, not confrontation."

At the end of his remarks, Mrs. Doyle, president of the Board of Education, asked Mr. Holmquist, "Do you intend to communicate these petitions to the Board when you have them all?" Mr. Holmquist replied, "Yes."

After the meeting the board went into executive session. As a result of such discussion, the following resolution was adopted:

"It was moved and seconded to accept the total package as presented including arbitration for dismissal of non-probationary teachers and *not* including agency shop; if the MTI does not accept this as a total package the offer of arbitration is withdrawn."

In later negotiations the board remained adamant in their position and the parties finally accepted such as the Agreement on December 14, 1971.

On January 5, 1972, MTI filed a complaint with the Wisconsin Employment Relations Commission against the board for alleged violations of sec. 111.70 (3) (a) (1) and 111.70 (3) (a) (4), Stats. The Commission issued its Findings of Fact, Conclusions of Law and Order on September 13, 1972. The petition seeking review of such Findings, Conclusions, and Order is presently before the court.

The court is of the opinion that denying a representative of a minority of the bargaining unit employees the right to appear at a public meeting of the board and to speak to the board on mandatory subjects of bargaining does not infringe upon the right of freedom of expression or the right to petition one's government, as guaranteed by the Wisconsin and United States Constitutions.

The Wisconsin Supreme Court in *Board of School Directors v. W.E.R.C.*, 42 Wis. 2d 637 (1968), held that a school board could properly deny the representative of a minority union the right to speak at a public meeting of the school board on negotiable matters and that such denial did not infringe upon the right of free speech as guaranteed by the Wisconsin Constitution.

The court held that a minority union had no right to negotiate with the employer and that, if the employer negotiated with the minority union, that in itself would be a prohibited practice. As the court stated in *LaCrosse County Institution Employees v. W.E.R.C.*, 52 Wis. 2d 295, 300 (1971):

> "The essence of the *Board of School Directors* case was merely that, if a municipality sees fit to bargain, it must do so with the certified representative of the employees and cannot negotiate with a minority union."

The crux of this case thus reduces to whether Holmquist's "statement" before the board constituted "negotiation" or was merely the giving of a "position statement." This same issue was extensively discussed in the *Board of School Directors* case, supra. The court stated at page 652:

> "If this case involved solely the giving of a position statement at an ordinary meeting of a public body, we would have some difficulty in labeling the conduct 'negotiating.' "

Even though Holmquist's statement superficially appears to be merely a "position statement," the court deems from the total circumstances that it constituted "negotiating." The court in *Board of School Directors*, supra, at page 653 stated:

> "On the other hand, if the minority union representative is permitted to influence the decision of the school board by his argument, then he is truly 'negotiating.' "

In the case at bar, Holmquist in fact desired to have the fair-share proposal deleted from the agreement. In addition, the school district did not remain passive in relation to this matter. When Reed and Holmquist commenced their anti-fair-share campaign, they showed their anti-fair-share document entitled "E.C. — O.L.O.G.Y." to building principals. They also received permission to circulate the "informational letter" to teachers through the teacher mail boxes. They were also permitted to circulate their anti-fair-share petition to teachers in the school buildings. Such permissiveness was in direct contradiction to

Article V, paragraph J, at page 57, and Article V, paragraph K, at page 57, of the negotiated agreement in effect between MTI and the board. Thus, the board's conduct involved more than its permitting Holmquist to speak to it on fair-share. It involved conduct which could only have for its purpose the frustration of the rights of the majority.

The court is also of the opinion that the decision of the Wisconsin Employment Relations Commission is reasonable and is not inconsistent with the requirements of sec. 111.70(3)(a)(3), Stats. Such decision does not require the employer to refuse to meet its statutory obligations under sec. 111.70(4)(d), Stats., nor is it contrary to the intent of sec. 111.70(2), Stats.

Accordingly, the Findings and Order of the Commission are affirmed. Counsel may prepare an appropriate judgment for the court's signature.

Dated: October 2, 1973.

BY THE COURT:

/s/ William C. Sachtjen
William C. Sachtjen, Judge

cc Attys. Kops, Hoornstra, Kelly, Ruhly

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

MADISON TEACHERS, INC.,

Complainant,

vs.

JOINT SCHOOL DISTRICT NO. 8, CITY
OF MADISON, VILLAGES OF MAPLE BLUFF
AND SHOREWOOD HILLS, TOWNS OF MADISON,
BLOOMING GROVE, FITCHBURG
AND BURKE, AND THE BOARD OF EDUCATION
OF JOINT SCHOOL DISTRICT No. 8, et al,

Respondents.

Case VIII
No. 15210 MP-107
Decision No. 11271

Appearances:

Madison City Attorney, by *Mr. Gerald Kops*, Assistant City Attorney, appearing on behalf of the Respondents.

Mr. Robert C. Kelly, Attorney at Law, appearing on behalf of the Complainant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Madison Teachers, Inc. having on January 6, 1972, filed a complaint with the Wisconsin Employment Relations Commission, wherein it alleged that Joint School District No. 8, City of Madison, et al. and the Board of Education of said school district had committed certain prohibited practices within the meaning of the Municipal Employment Relations Act; and hearing in the matter having been conducted on February 28,

1972 at Madison, Wisconsin by the Wisconsin Employment Relations Commission, Chairman Morris Slavney and Commissioner Zel S. Rice II being present; and the Commission, having reviewed the evidence and briefs of Counsel, as well as briefs amicae filed by the Wisconsin Education Association, and the National Right To Work Legal Defense Foundation, being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That the Complainant, Madison Teachers, Inc., hereinafter referred to as MTI, is a labor organization, having its principal office at 121 South Hancock Street, Madison, Wisconsin.

2. That the Respondent Joint School District No. 8, City of Madison, Villages of Maple Bluff, and Shorewood Hills, Towns of Madison, Blooming Grove, Fitchburg, and Burke, hereinafter referred to as the District, operates a school system in said city, villages and towns, and has its principal office at 545 West Dayton Street, Madison, Wisconsin; and that Respondent Board of Education of the District, hereinafter referred to as the Board, is an agent of the District and is charged with the possession, care, control and management of the property and the affairs of the District.

3. That MTI is the majority collective bargaining representative for all regular full-time and regular part-time certificated teaching personnel employed by the District, including psychologists, psychometrists, social workers, attendants and visitation workers, work experience coordinator, remedial reading, University Hospital teacher, trainable group, librarians, guidance counselors, teaching assistant principals (except at Sunnyside school), teachers on leave of absence, but excluding on-call substitute teachers, interns and all other employes, principals, supervisors and administrators, having been certified as such by the Wisconsin Employment Relations Commission on June 7, 1966.

4. That since 1966, MTI and the Board have, as a result of conferences and negotiations, entered into a series of collective bargaining agreements covering the wages, hours and conditions of employment of the aforementioned bargaining unit personnel, the last of such written agreements had for its term the period commencing January 1, 1971 and ending December 31, 1971; that said agreement included among it provisions the following in Article II:

"A. CONFERENCE AND NEGOTIATION

. . .

c. Each party to this Agreement desiring to be represented by agents for negotiating agrees to furnish to the other party a list of its duly authorized agents for such purposes. Each party agrees to negotiate only with said agent and no others, including their principals, namely, the Board of Education or Madison Teachers, as the case may be, unless the latter as principals authorize negotiations with others or themselves.

d. If matters which are proper subjects of negotiations are brought, whether in the form of a grievance, petition or otherwise, to the attention of either of the parties to this Agreement by any individual, group of individuals or organization other than the other party to this Agreement or its duly authorized agents such latter party shall be punctually informed of such action."

5. That by letter dated January 25, 1971, MTI gave the Board timely notice of its desire to modify the existing written agreement as of the end of its term; that MTI accompanied such notice with its written proposal of modifications, deletions and additions to be made in such existing agreement for the 1972 agreement; that included in such proposal was a proposal that the 1972 agreement, covering the 1972 calendar year, contain a fair share agreement.

6. That conferences and negotiations between the parties for a successor agreement covering the calendar year 1972 continued until October 4, 1971; that the fair share proposal was a subject of such conferences and negotiations during this entire period of time; that the Board objected to incorporating the proposed fair share agreement into the 1972 agreement, for one of the reasons that fair share agreements were not permitted under the law, specifically under Section 111.70 of the Wisconsin Statutes as then promulgated; that on October 4, 1971, MTI submitted a revised fair share proposal to the Board in negotiations, wherein the MTI proposed that the parties agreed to incorporate a fair share agreement into the 1972 agreement, but that such fair share agreement would not become effective until such provisions were specifically permitted by enabling legislation; and that the fair share agreement proposal continued to be a subject under discussion at the bargaining table.

7. That Chapter 124, Laws of 1971, as adopted by the Legislature was published on November 10, 1971, becoming effective by virtue of Section 990.05, Wis. Stats. on November 11, 1971; that Chapter 124, Laws of 1971, among other things amended Section 111.70 (2), Wis. Stats. so as to permit municipal employers and the majority representative of its employes to enter into a fair share agreement as defined by Section 111.70(1) (h) of the Statutes; that thereafter, on November 17, 1971, MTI submitted to the Board in negotiations, a third fair share proposal, which proposal complied with the provisions of Municipal Employment Relations Act established by Chapter 124, Laws of 1971, relative to fair share agreements.

8. That by November, 1971 the number of unresolved issues between the parties was reduced to approximately thirteen, including issues with respect to MTI's proposals of binding arbitration of nonrenewal of teacher contracts and teacher dismissals, as well as the fair share agreement; that the Board

had stood fully opposed to providing for binding arbitration of teacher nonrenewals and teacher dismissals during the entire period of negotiations first commencing on January 25, 1971; that, likewise, the Board had consistently taken a position against MTI's fair share proposal; that however, at one time in the latter part of October, or early part of November, Paul Olson, Chief Negotiator for the Board, during a meeting Chief Negotiator for MTI, indicated that he could see no way in which the Board would grant bindining arbitration of teacher nonrenewal and dismissal, but that there was a distinct possibility that the Board would grant fair share; and that Olson had also indicated to MTI that there were two members of the Board who would grant the fair share proposal if MTI would drop its demand for binding arbitration of teacher nonrenewal and dismissal.

9. That in November, 1971 Ralph K. Reed and Albert Holmquist, teachers employed by the District, neither of whom are members of MTI, drafted a document, made a part hereof as Appendix "A", and mailed same on November 14, 1971 to all teachers in the employ of the District.

10. That Reed and Holmquist received approximately two hundred replies to such letter, the majority of which were favorable to their position on fair share; that thereafter Reed and Holmquist called a meeting of those teachers who had indicated they would work actively against any fair share agreement; that such meeting was held on Thursday, December 2, 1971, and was attended by fourteen teachers, seven of whom were MTI members and seven of whom were not; that as a result of said meeting additional three documents, made a part hereof as Appendix "B", "C", and "D", were prepared and printed and hand delivered or mailed to certain teachers, who distributed said documents to other teachers during their free periods in the various schools between December 2nd and 6th, 1971.

11. That on December 6, 1971 Reed, upon his request, was given permission by the Principals of Van Hise Elementary and Junior High Schools to circulate the "petition" among teachers in said schools on Reed's free time, as well as permission to use the teachers' school mailboxes for the distribution of a letter, made a part hereof as Appendix "E".

12. That a regular meeting of the Baord was held during the evening of December 6, 1971; that among others present at said meeting, were officers and representatives of MTI, as well as three to four hundred teachers, who were members of MTI; that Reed and Holmquist were also present; that during a portion of said meeting, described in the meeting agenda as "Public Appearances", the president of MTI, Paul Du Vair, addressed the Board, urging the Board to resume negotiations with MTI and to reach an agreement on the provisions of the 1972 collective bargaining agreement; that upon the conclusion of his remarks, Du Vair presented to the Board a statement, containing the signatures of between thirteen and fourteen hundred teachers, setting forth that "We the undersigned wish the parties to resume negotiations and reach agreement as quickly as possible"; that Holmquist was also permitted to speak to the Board; that Holmquist prefaced his remarks to the Board by stating:

> "My name is Albert Holmquist. I reside at 5626 Crestwood Place. I am another teacher. I represent an informal committee of 72 teachers in 49 schools. I would like to inform the Madison Board of Education, as I already have the Madison Teachers Incorporated, about the results of an informational survey regarding one of the thirteen or so items now on the conference table and one of the main items that will certainly be included in some form in the new package.";

that Holmquist then read to the Board the text of the Petition he had circulated among the teachers dated December 6, 1971; that in so doing he stated as follows:

"To: Madison Board of Education, Madison Teachers Incorporated. We the undersigned ask that the fair-share proposal (agency shop) being negotiated by Madison Teachers Incorporated and the Madison Board of Education be deferred this year. We propose the following: 1) The fair-share concept being negotiated be thoroughly studied by an impartial committee composed of representatives from all concerned groups. 2) The findings of this study be made public. 3) This impartial committee will ballot (written) all persons affected by the contract agreement for their opinion on the fair share proposal. 4) The results of this written ballot be made public."

"We feel this study necessary because neither the board's negotiators who have placed entirely too much emphasis on this one point nor Madison Teachers, Inc. which speaks euphemistically about the 'whole package' and therefore is not issue specific ... Neither has properly addressed the serious issue of fair-share and agency shop. We find much confusion in the proposal as it stands and even more on the part of teachers' interpretations of it. For evidence, 417 teachers from the 31 schools which represents 53% of the total number of these faculties of these schools ... who have called in to this hour have signed the petition on the first day it was taken into their schools. Due to this confusion, we wish to take no stand on the proposal itself, but ask only that all alternatives be presented clearly to all teachers and more importantly to the general public to whom we are all responsible. We ask simply for communication, not confrontation."

13. That at the conclusion of Holmquist's remarks, Mrs. Doyle, President of the Board, asked Holmquist, "Do you intend to communicate these petitions to the Board when you have them all."; that Holmquist replied in the affirmative; and that no other Board member spoke to Holmquist on the matter; that immediately after its regular public meeting the Board went into executive session, during which the unresolved issues, including arbitration of teacher nonrenewal and dismissal and fair share were discussed by the Board; that as a result of such discussion a resolution was adopted by the Board as follows:

"It was moved and seconded to accept the total package as presented including arbitration for dismissal of non-probationary teachers and *not* including agency shop; if the MTI does not accept this as a total package the offer of arbitration is withdrawn".

14. That on December 7, 1971, authorized representatives of MTI met with authorized representatives of the Board in a previously scheduled negotiations meeting; that Dr. Ritchie, Superintendent of Schools, and an agent of the District, at the opening of such negotiation meeting, gave the representatives of MTI a copy of the above resolution informing such representatives that such resolution stated the Board's position, indeed "that this was the deal"; that discussions concerning the Board's position and fair share took place during such meeting; that the Board's representatives remained adamant in their position and in the afternoon of that day the parties reached tentative agreement upon MTI accepting the Board's position and that such tentative agreement was accepted as the Agreement by both parties on December 14, 1971.

Upon the basis of the above and foregoing Findings of Fact, the Commission makes the following

CONCLUSIONS OF LAW

That Joint School District No. 8, City of Madison, Villages of Maple Bluff and Shorewood Hills, Towns of Madison, Blooming Grove, Fitchburg and Burke, and the Board of Education of Joint School District No. 8, et al, in permitting teacher Albert Holmquist to appear and speak at a meeting of the Board on December 6, 1971, as a representative of a minority of the teachers in its employ, on the matter of the fair share agreement, a matter subject to negotiations between said Municipal Employer and Madison Teachers, Inc., the majority bargaining representative of certificated teaching personnel in the employ of said Municipal Employer, violated its duty to bargain in good faith with Madison Teachers Inc., and Joint School District No.

8, City of Madison, Villages of Maple Bluff and Shorewood Hills, Towns of Madison, Blooming Grove, Fitchburg and Burke, and the Board of Education of Joint School District No. 8, et al, thereby interfered with the rights of employes represented by Madison Teachers Inc. to bargain collectively with representatives of their own choosing, and further thereby Joint School District No. 8, City of Madison, Villages of Maple Bluff and Shorewood Hills, Towns of Madison , Blooming Grove, Fitchburg and Burke, and the Board of Education of Joint School District No. 8, et al, committed prohibited practices within the meaning of Sections 111.70 (3) (a) 4 and 1 of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes the following

ORDER

IT IS ORDERED that Joint School District No. 8, City of Madison, Villages of Maple Bluff and Shorewood Hills, Towns of Madison, Blooming Grove, Fitchburg and Burke, and the Board of Education of Joint School District No. 8, et al,

1. Shall immediately cease and desist from permitting employes, other than representatives of Madison Teachers Inc., to appear and speak at meetings of the Board of Education, on matters subject to collective bargaining between it and Madison Teachers Inc.

2. Take the following affirmative action which will effectuate the policies of the Municipal Employment Relations Act;

(a) Officially incorporate the instant Findings of Fact, Conclusions of Law and Order in the minutes of the Board of Education.

(b) Immediately notify Madison Teachers Inc. that they will not permit any employe in the bargaining unit

represented by Madison Teachers Inc., other than a representative of Madison Teachers Inc., to appear and speak on matters subject to collective bargaining between them and Madison Teachers Inc.

(c) Notify the Wisconsin Employment Relations commission within thirty (30) days of the receipt of a copy of this Order as to what steps they have taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin, this 13th day of September, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By *Morris Slavney /s/*
Morris Slavney, Chairman

Zel S. Rice II /s/
Zel S. Rice II, Commissioner

Jos. B. Kerkman /s/
Jos. B. Kerkman, Commissioner

APPENDIX "A"

"Dear Fellow Madisonian Educator,

E. C. — O. L. O. G. Y.

*E*ducator's *C*hoice - *O*bligatory *L*eadership *O*r *G*rievance by *Y*ou

SAVE FREEDOM OF CHOICE

A Closed Shop (agency shop) Removes This Freedom

1. Does an organization which represents the best interests of teachers and pupils NEED mandatory membership deductions?

2. Need relationships between administrators and teachers be further strained by LEGALLY providing for mandatory adversary camps?
3. Should minority voices be mandatorily SILENCED?
4. Could elimination of outside dissent produce NON-RESPONSIVENESS to change?
5. And . . .

   isn't this lack of FREEDOM OF CHOICE undemocratic?

SUPPORT FREEDOM OF CHOICE —
OPPOSE AGENCY SHOP

I wish to maintain freedom of choice:

I oppose agency shop on principle

I oppose agency shop and would sign a petition stating so

I oppose agency shop and would work actively to maintain freedom of choice

Let us hear from YOU.

Al Holmquist /s/
Al Holmquist

E.C.—O.L.O.G.Y.
P.O Box 5184
Madison, WI 53705

Ralph Reed /s/

Ralph Reed
Teacher co-chairmen"

APPENDIX "B"

"Dear Colleague,

1) The enclosed petition was drawn up Thursday night by a group of teachers.
2) Accompanying it is a letter of current, pertitant information. It may be used as a source for your own personal reference, posted on bulletin boards or even

dittoed for mailbox stuffing (which is allowable). Please add information you may have to make it as specific to your situation as possible. (as below)

3) The following people in your school:

   have written they would also work actively

   have written they would sign the petition

   have written they are opposed to the concept of agency shop on principle

   Thirty-five others mailed in unsigned responses but indicated that they would sign the petition.

4) It is imperative to work quickly. We would like to present a first-day's total to MTI and the Board of Education this MONDAY night, Dec. 6. (It is the night of the last board meeting under our present contract)

   Please call in 1) the number of signers

   2) the percentage of your faculty contacted the first day

   _____ between 5 and 7 pm

5) When you have contacted everyone in your school affected by the contract please return the petition to Concerned Educators, Box 5184, Madison, Wi 53705

Who will sign for certain?

Who will sign after others do?

Which others?

Who might sign if you ask them first but might not sign later?

Would a closed system be as responsive? to individual members

Isn't a loyal opposition necessary?

Freedom of Choice?

Ability to influence an
organization by withholding
of dues?

Who won't sign? (Don't be sure. Half of the people who wrote the petition are MTI members. Many MTI'ers responded to the original letter. And this point *was* included in the negotiation package by a close vote of the board of directors)

Thank you for your efforts and your support.

The Committee"

APPENDIX "C"

"POINTS OF INFORMATION

1. FAIR-SHARE, agency shop, and union shop need not be the same thing

fair-share —	the bargaining unit collects that *portion* of dues that goes *directly* toward negotiation and contract administration costs
agency shop —	the bargaining unit collects uniform dues and fees from members and non-members as a condition of employment
union shop —	you have thirty days to join the union or you have no job.

2. However, the current fair-share agreement proposal, in its language, EQUATES fair-share agreement and agency shop by definition.

   'It is understood and agreed by and between the parties hereto that the employer will deduct from the monthly earning of the employees in the collective bargaining unit a fair share, SUCH AMOUNT BEING the monthly dues certified by Madison Teachers as the current dues UNIFORMLY REQUIRED OF ALL MEMBERS.'

3. This proposal, as is, was included as a point for negotiation by a close vote of the MTI board of directors.
4. MTI has refused to poll its membership on this perhaps critical individual point of negotiation.
5. It is true that legally, one need not join MTI under the fair share proposal.
6. However, even with a real fair-share agreement (as well as with the present proposal) everyone covered by the contract *must* become a MEMBER OF WEA and NEA. Right now part-time teachers who pay partial MTI dues *must* pay full NEA and WEA dues as full members.
7. For even a real fair-share proposal to take effect it must have the support of the majority of all affected by the contract.
8. The enabling legislation, Senate bill 198A, is constitutional according to our legal advice.
9. The petition is not to be construed as anti-MTI. All that is asked is that the present fair-share proposal be defered this year until adequate study and dissemination of information — and *your* opinion is known.

for communication, not confrontation"

APPENDIX "D"

"To: Madison Board of Education

Madison Teachers, Incorporated

We the undersigned ask that the fair-share proposal (agency shop) being negotiated by Madison Teachers, Incorporated and the Madison Board of Education be defered this year. We propose the following:L

1) The fair-share concept being negotiated be thoroughly studied by an impartial committee composed of representatives from all concerned groups.

2) The findings of this study be made public.

3) This impartial committee will ballot (written) all persons affected by the contract agreement for their opinion on the fair-share proposal.

4) The results of this written ballot be made public.

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

APPENDIX "E"

"Dear fellow Van Hise Teachers, Dec. 6, 1971

In the next few days you will be asked to sign a petition asking that the FAIR SHARE (AGENCY SHOP) proposal being negotiated between M.T.I. and the Board of Education be deferred until the topic has been studied, information from the study has been disseminated to all concerned, and all teachers have been balloted as to their position on this important issue.

Please consider the following informational points:

1. FAIR-SHARE, agency shop, and union shop need not be the same thing.

   Fair-share: The bargaining unit collects that *portion* of dues that goes *directly* toward negotiation and contract administration costs.

   Agency shop: The bargaining unit collects uniform dues and fees from members and non-members as a condition of employment.

   Union shop: All employees have thirty days to join the union or they loose their job.

2. The current fair-share proposal, in its language, EQUATES fair-share agreement and agency shop by definition.

'It is understood and agreed by and between the parties hereto that the employer will deduct from the monthly earning of the employees in the collective bargaining unit a fair share, SUCH AMOUNT BEING the monthly dues certified by Madison Teachers Incorporated, as the CURRENT DUES UNIFORMLY REQUIRED OF ALL MEMBERS.' (emphasis mine)

3. This proposal was included as a point for negotiation by a very close vote of the MTI board of directors.

4. MTI has refused to poll its membership in this perhaps critical individual point of negotiation.

5. Legally, it is true that one need not joint MTI under the fair share proposal.

6. However, even with a 'real' fair-share agreement (as well as with the present proposal) everyone covered by the contract *must* become a MEMBER of WEA and NEA. Presently, part-time teachers who pay partial MTI dues MUST pay FULL NEA and WEA dues as full members.

7. For any fair-share proposal to take effect it must have the support of a majority of all affected by the contract.

8. The enabling legislation, Senate bill 198A, is constitutional according to our legal advice.

9. The petition being presented is NOT to be construed as anti-MTI. All that is asked is that the present fair-share proposal be deferred this year until adequate study and dissemination of information — and *your* opinion is known.

For communication, not confrontation,

Ralph K. Reed /s/
Ralph Reed
Rm. 111"

See me if you have
additional questions not
covered above.

JOINT SCHOOL DISTRICT NO. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG AND BURKE, AND THE BOARD OF EDUCATION OF JOINT SCHOOL DISTRICT NO. 8, et al, VIII, Decision No. 11271

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Pleadings

In its complaint MTI alleged that, by permitting Holmquist, as an individual employe and as the representative of seventy-two other employes, to attempt to influence the School Board, hereinafter referred to as the Board, on behalf of the District in its decision regarding the issue on the fair-share agreement as proposed by the MTI during bargaining, the District negotiated with an individual employe or a group of employes, and that thereby the Board interfered with and restrained bargaining unit employes in their right to bargain collectively through representatives of their own choosing in violation of Sec. 111.70 (3) (a) 1 of the Municipal Employment Relations Act, hereinafter referred to as MERA, and further, that the Board thereby failed and refused to bargain collectively with MTI in violation of Sec. 111.70 (3) (a) 4 of MERA. MTI would have the Commission order the Board to cease and desist from such activity "now and in the future", and further requests the Commission to order that the Board expunge from its official minutes "any and all references to the remarks" made by Holmquist at the December 6, 1971 meeting of the Board, and further that the Board expunge from its minutes and records "any reference to any written petitions, including such written petitions themselves" received by the Board from Holmquist on December 6, 1971.

In its answer the District contended that Holmquist's remarks made at the Board meeting of December 6, 1971

"involved solely the giving of a position statement at an ordinary meeting of a public body and thus cannot be labeled as negotiating", that Holmquist was not questioned by the Board, and that the Board refrained from any discussion or conversation with Holmquist during and after his statement. The District denied the commission of any prohibited practices and requested that the complaint be dismissed.

The Facts

All the facts dispositive of the issues involved herein are set forth in detail in the Findings of Fact.

The Positions of the Parties

As indicated in the preface of the Commission's decision both the MTI and the District filed briefs./[1] Upon permission from the Commission, briefs amicus were filed by the Wisconsin Education Association and the National Right to Work Legal Defense Foundation. The Commission appreciates the thoroughness and quality of said briefs, and in that regard commends those who prepared same./[2]

The Position of MTI

MTI sets forth two basic arguments in support of its complaint that the District committed the prohibited practices as alleged in the complaint filed herein. It contends that:

1. "In permitting a representative of a minority of its bargaining unit employes to appear at a public meeting of the Board and to speak to the Board on fair share, a mandatory subject of bargaining, the Board

---

/[1] MTI also filed a reply brief.

/[2] A review of the record, which refreshes a recollection of the hearing, warrants complimenting Attorney Kelly and Attorney Kops for their attitude, conduct and competency in making the record in the instant matter.

failed and refused to collectively bargain with MTI as the representative of a majority of its employes in violation of Section 111.70 (3) (a) 4, Wis. Stats., and interfered with the right of said bargaining unit employes to collectively bargain through MTI as the representative of their own choosing in violation of Section 111.70 (3) (a) 1, Wis. Stats."

2. "A Municipal Employer cannot base its decision to reject a fair share proposal on a poll of its bargaining unit employes."

In support of its first contention MTI argues that the Board was bound to "deal exclusively" with it as the exclusive representative of its teachers, and that therefore a minority union,/[3] or a minority group of employes,/[4] cannot negotiate with the Board and likewise the Board is prohibited from negotiating either with a minority union or a minority group of employes, and if it does so, the Board violates its duty to bargain with the exclusive bargaining representative.

In said regard MTI argues:

"Holmquist as the representative of a minority of teachers was permitted to discuss with the Board, i.e. to convey to the Board the minority's ideas and thoughts on a mandatory subject of bargaining, and to possibly influence the decision of the Board as concerns such subject. Whether a two-sided conversation took place or not is immaterial. Holmquist as a minority representative was permitted to influence the Board in its decision making role and on a question of conditions of employment. Whether the remarks made by Holmquist did in fact influence the Board in its decision making process is also immaterial. His remarks

---

/[3] *Milwaukee Board of School Directors v. WERC*, 42 Wis. 2d 637 (1968)

/[4] *M & M Chevrolet Co.* (4083-A) 4/56

could have had that affect. Indeed a strong inference arises from the facts in this matter that his remarks did so influence the Board in its bargaining position.

Immediately after the public meeting during which such remarks were made, the Board went into executive session. During such session it discussed the unresolved issues of fair share, the issue discussed previously by Holmquist, and arbitration of teacher nonrenewals and dismissals. Up to that time the Board had refused to accept MTI's proposals as concerns either issue. During such discussion the Board changed its position in this regard. Indeed the Board by resolution agreed for the first time to accept binding arbitration of teacher renewals and dismissals and at the same time resolved to reaffirm its position against fair share. In effect the Board to some extent accepted the position proposed by the minority."

In support of its second principal contention MTI argues, in material part, as follows:

"If a majority bargaining representative proposes during negotiations that the parties agree upon a fair share agreement incorporating the same into a written collective agreement, the employer must meet and confer with such majority representative at reasonable times, in good faith, with respect to such conditions of employment, with the intent of reaching an agreement thereon. While the employer is not compelled to agree to any fair share agreement proposed or to make any concession concerning the same, it is required to meet and confer at reasonable times relative to such agreement, in good faith with the intention of reaching agreement. The employer cannot negotiate publicly or privately with a minority as concerns fair share agreements or base its refusal to accept fair share on the premise that a number of bargaining unit teachers do not support a fair share agreement.

The statute does give the employer the right to petition the Commission for a referendum and does provide that such a petition must be supported by proof that at least 30% of the employees in the bargaining unit desire that the fair share agreement be terminated.

The statute therefore clearly permits the employer to receive from its employes, and through other than the majority representative, proof that such employes do not favor the fair share agreement. Obviously the proof may be obtained in unsolicited employe petitions.

When may the employer receive such proof? Certainly not during negotiations when in its decision making role it must decide whether to agree to a fair share proposal or not. It may only receive such information when a fair share agreement is already agreed upon by the employer and the majority bargaining representative and the question is does a majority of the bargaining unit employes favor the continuance of such agreement. ...

ERB 15.06 (of the Commission's rules) entitled "Stipulation for Referendum Seeking Authorization to Implement Fair-Share Agreement" provides that when a municipal employer and the majority bargaining representative of its employes in their negotiations with respect to the inclusion of the fair-share agreement in their collective bargaining agreement, jointly desire to determine whether the employes in the involved collective bargaining unit favor the implementation of a fair-share agreement, such municipal employer and such labor organization, or anyone lawfully authorized to act on their behalf, may file a stipulation for a referendum for said purpose. Such stipulation must contain a statement by the municipal employer that it will incorporate a fair-share agreement into the collective bargaining agreement if the required number of employes vote in favor of implementing such agreement. Conversely, such Stipulation must contain a statement by the labor organization that it agrees to withdraw its request in negotiations for a fair-share agreement in the event the required number of employes do not vote in favor of the implementation of such agreement. Resort to such a stipulation and employe self determination through the election process then can only occur *after* the employer and the majority labor organization have come to agreement on a fair-share agreement.

There simply is no provision allowing or permitting the employer to poll his employes or to accept and consider a written poll of his employes as part of the decision making process in deciding whether to accept or reject a fair-share agreement.

An election may be had, in which employes can approve or disapprove of the continuation of a previously agreed upon fair-share agreement, pursuant to a Petition or a Stipulation. An election may also be had in which employes indicate whether or not they favor the implementation of a fair-share agreement, but only if the employer states in writing that it will incorporate a fair-share agreement into the collective bargaining agreement upon a favorable employe vote.

The employer cannot refuse or reject a fair-share agreement proposed in negotiations basing such refusal on the fact that a number, even a majority, of its bargaining unit employes have disclosed to it orally or in writing that they do not favor fair share.

Chaos would result if the rule were otherwise. If an employer could rely on petitions signed by a substantial minority of its employes or even a majority of its employes as the basis for rejecting fair-share agreements, the secret balloting provision of the election process established by the WERC would be rendered valueless.

A multitude of legal questions could and would arise as to the validity of the signatures on the petition, whether the employes understood what they were signing, whether the petition was unsolicited or whether it was obtained directly or indirectly through improper management persuasion, and so on.

Fair-share agreements simply are not unique subjects of bargaining upon which the employer can bargain with the minority either privately or in public.

In the instant matter the Board permitted Holmquist as the representative of an informal minority of bargaining unit employes to appear at a public meeting of the Board and

to speak against the fair-share arrangements proposed by MTI as the majority bargaining representative. In doing so the Board consciously undermined the bargaining position of MTI as the majority representative of its bargaining unit employes."

The District, in support of its answer that the complaint should be dismissed, in its brief sets forth three basic contentions as follows:

1. The Board in permitting Holmquist to speak and present the petition involved, during an ordinary Board meeting and in the presence of MTI officials, acted within its duty "to recognize and respect the constitutional rights of all its employees to speak freely and petition their government.

2. The Board did not violate its duty to bargain with MTI or interfere with the rights of its employes, when in the presence of MTI officers "it merely listened to a representative of an informal committee of bargaining unit employees during the public appearance portion of a regularly scheduled meeting, read a petition concerning 'fair share' circulated among Madison teachers and heard that 417 teachers had signed the petition".

3. The Board acted "in conformity with its responsibilities under Section 111.70" in listening to Holmquist regarding negotiable matters, receiving information, thoughts or sentiments of employes in the bargaining unit "in the absence of an express or implied desire by the employer to deal directly with the employes and affirmative action soliciting or inducing the employees to deal directly with" the board.

In support of its first argument the District contends that the First Amendment to the federal constitution,[5] as well as Article I, Section 3 of the Wisconsin Constitution, guarantees the right of persons to petition the government or any party thereof, and the right to speak and publish sentiments freely. Therefore the District concludes that all teachers in its employ, as citizens, "possess the right to speak freely and the right to petition" the Board, and that the Board has the responsibility to refrain from obstructing such right.

Secondly the District argues that it recognizes its duty to bargain exclusively with MTI on the issue of a fair share agreement, however, that the Board's action in the meeting involved with respect to listening to Holmquist did not constitute a failure in its duty to bargain with MTI.

In support of its third basic argument the District, in its brief argues, in part as follows:

"There is no evidence in this record that either the Board of Education recognized an obligation or intended to assume an obligation to meet and confer with Mr. Albert Holmquist or his group at reasonable times with an intention of reaching an agreement with those individuals. There is no evidence, expressed or implied, that the Board wished to deal with persons other than the certified representative. Further, there is no evidence to indicate the Board or Administration solicited or induced direct dealing with employees in derogation of the collective bargaining representative. The Board merely received information. Listening is not bargaining.

---

[5]Citing Pickering v. The Board of Education, 391 U.S. 563 (1968)

It is also clear Mr. Holmquist's remarks cannot be considered 'collective bargaining' within the statutory definition. Mr. Holmquist merely wished to inform the *bargaining parties* that some teachers were confused about the 'fair-share' proposal presently on the bargaining table. His testimony indicates that he was not interested in establishing a bargaining relationship with the Board of Education. On the contrary, his remarks clearly recognized that Madison Teachers Incorporated was the exclusive bargaining representative for the teachers. His efforts were aimed at getting the bargaining parties off dead center, not undermining the majority representative.

Mr. Holmquist recognized the Board of Education and Madison Teachers Incorporated as the sole bargaining parties for the teachers in the District. Additional support for this suggestion can be seen in the petition itself which was read to the Board. The petition is addressed to Madison Teachers Incorporated and the Board of Education. Transcript Page 94.

The act of the Board of Education in permitting Mr. Holmquist to speak cannot be considered 'collective bargaining' in light of the statutory definition.

Section 111.70 (4) (d) of the Wisconsin Statutes (1971) provides additional support for the Respondent's position that an employer may receive information from and listen to bargaining unit employees concerning bargaining matters without running afoul of its responsibilities under the act.

The only contact between Mr. Holmquist and the Board of Education or the School Administration was in the presence of the officials of the majority representative of the teachers of the District. Indeed, on December 6th, the President, Executive Secretary and Chief Negotiator for Madison Teachers were present in the audience when Mr. Holmquist made his statement. The statute safeguards the right of an employee to communicate with an employer. In this case the Board merely listened and, in so doing, allowed what is declared lawful by statute.

Finally, the legislature has provided a procedure by which a union security agreement entitled 'Fair-Share' may be terminated. Section 111.70 (2) Wisconsin Statutes (1971). This procedure may be initiated by an employer or a labor organization upon a 30% showing of interest by the employees in the bargaining unit. This section thus assumes that unsolicitated information from employees concerning 'fair-share agreements' may be received after an agreement on fair-share by the parties. It thus further assumes that receipt of information by the employer after an agreement from dissenting members of the bargaining unit is not 'bargaining' or 'negotiating' with third parties.

The Complainant argues that this legislative enactment merely allows the receipt of information from employees after agreement and, therefore, does not presume that an employer may receive information prior to agreement on fair-share. However, the Complainant misses the point of the argument. Complainant's argument suggests that the receipt of information on negotiable matters from employees prior to the agreement is bargaining while receipt of information after agreement with the bargaining representative is not bargaining. He presumes that the legislature would allow bargaining by third parties after an agreement had been reached but prevent bargaining by third parties before an agreement was reached. This argument does not make sense.

It is more consistent with the intent of the act to suggest that the legislature understood that the mere receipt of information is not 'bargaining' prior to or after a collective bargaining agreement is reached and thus, it established a procedure where it is presumed the employer will receive information. The Complainant's argument suggests that the legislature would sanction activity considered direct bargaining after an agreement was reached but prohibited activity considered direct bargaining before agreement. The Respondent suggests the legislature understood listening and receiving information is not bargaining."

In support of its argument that an employer may receive information concerning bargaining matters from employes and discuss matters of collective bargaining with employes and listen to negative information "about the majority representative without violating its duty to bargaining and without interfering with the bargaining rights of its employes", the District cites a number of decisions of the National Labor Relations Board. [6/]

Further, the District would distinguish the instant events from the applicability of Wisconsin Supreme Court's decision in *Milwaukee Board of School Directors, supra*, contending that the Board meeting of December 6th was "an ordinary meeting of the Board" and not "a public bargaining session or the meeting at which the Board was to take final action on the Negotiated Agreement with the majority representative". In addition the District contends that herein Holmquist merely gave a position statement, and that the "Supreme Court suggested that under these circumstances it would have some difficulty in labeling the conduct 'negotiating' ", and therefore not violative of the Act.

The District contends "to suggest that a municipal employer must stifle a minority organization would obviously be action that would discourage membership in a minority organization and encourage membership in the majority union, a clear violation of Section 111.70(3) (a)3 of the Wisconsin Statutes."

Finally, the District argues that Article II, 2 of the collective bargaining agreement existing between the parties contemplated the activity involved herein.

[6/] *White Sulphur Springs Co.* CA DC (1963) 316 F. (2d) 410; *Lawn Boy Div. Outboard Marine Corp.*, 143 NLRB 535, (1963); *Baldwin County Electric Membership Corp.*, 145 NLRB 1316 (1964); *Coast Broadcasting Corp.*, 151 NLRB No. 117 (1965); *American Printing Co.*, 173 NLRB No. 17 (1968); *Tobasco Concrete Co.*, 177 NLRB No. 101 (1965)

In its brief amicus the National Right to Work Legal Defense Foundation supports the argument of the District that to require the Board to "stifle the speech of a teacher removes the constitutional protection for freedom of expression"; that the *Milwaukee Board of School Directors case* is distinguishable from the instant matter, contending that Holmquist's remarks "cannot be interpreted as negotiation"; that there is no evidence that the Board was motivated to undermine the MTI as the certified bargaining representative; and that Sec. 111.70(4) (d) 1 protects the right of individual employes to present grievances.

In its reply brief MTI contends that had the Board denied Holmquist the opportunity to speak it would not have infringed upon or abridged Holmquist's right of free speech, since "freedom of speech" cannot be used to engage in conduct constituting a refusal to bargain in good faith with MTI as the exclusive bargaining representative.

With respect to the District's argument that federal cases support a conclusion that in permitting Holmquist to speak the Board did not fault its duty to bargain with MTI, the latter argues that the cases cited by the District are not in point, but, on the contrary, the factual situations therein are distinguishable from those in the instant proceeding. MTI attacks the District's contention that the Board acted in conformity with its responsibilities under MERA in listening to bargaining unit employes on negotiable matters or discusses such matters with employes in the absence of the bargaining representative in the absence of an expressed or implied desire "to deal directly with the employes and affirmative action soliciting or inducing employes to deal directly" with the Board. MTI argues that a finding of prohibited interference does not require a finding of anti-union animus. [7/]

[7/] *City of Milwaukee* (8420) 2/68

Further, MTI contends that the total conduct of the Board's agents, including the permitting of the distribution of letters to teachers through teacher mailboxes, the circulation of the petition in the school buildings, all with the permission of the principals involved, permitting Holmquist to speak at the Board meeting, and the timing of the Board's final offer, are supportive of a conclusion that the Board committed prohibited practices as alleged.

In reply to the defense that the Board's action with respect to the receipt of the petition was consistent with Article II, 2 (d) of the collective bargaining agreement between the parties, MTI replies as follows:

> "Section 2 (c) makes it crystal clear that matters which are the proper subject of negotiations are to be dealt with by the authorized agents and only the authorized agents of the respective parties. It is improper for a principal to the agreement on the one side and a group which is neither principal nor agent, on the other side, to discuss matters which are proper subjects of negotiation. Neither party in such a discussion is properly taking part in such discourse. Any such action, by the express terms of Article II 2 (c), is in direct violation of the Agreement.
>
> Article II 2 (d) simply makes it clear that each party has the duty to bring to the attention of the other any such deviation from the proper negotiating process. If others than an authorized party should bring matters, which are the proper subject of negotiations, to one of the parties to the Agreement, such party has the duty to promptly notify the other party of that fact so that any problems caused by such improper conduct may be quickly resolved. Section 2 (d) provides a procedure to remedy improper activity in negotiations; its purpose is not to provide a vehicle to admit unauthorized parties into the negotiation process.
>
> When paragraphs 2 (c) and 2 (d) of Article II (A) of the Negotiated Agreement, entitled 'Conference and Negotiation' are read together, as they must be, it is clear that the Negotiated Agreement does not support the position advanced by the Respondent."

In response to the Board's contention that the receipt by the Board of a showing of interest opposing a fair share agreement does not constitute bargaining or negotiation, MTI contends that MERA does not permit a municipal employer to accept or consider a written poll of its employes as part of its decision with respect to the acceptance or rejection of a proposal with respect to a fair share agreement, since the statute does not require any balloting of employes prior to the implementation of a fair share agreement, and that a showing of interest executed by at least 30% of the employes in the unit is necessary only to initiate a vote to determine whether an existing fair share agreement should be continued.

Finally, the MTI contends that Holmquist's appearance and remarks before the Board cannot be considered a grievance as contemplated in Sec. 111.70 (4) (d) of the Act.

The Wisconsin Education Association, in its brief amicus, supports MTI's argument that a ruling that the Board violated its duty to bargain would not abridge Holmquist's constitutional rights; that anti-union animus need not be established to find a refusal to bargain in good faith; and that the only real issue herein involves whether the receipt of Holmquist's communication constitutes a violation of the Board's duty to bargain only with the exclusive representative. In that regard the WEA contends:

> "Holmquist told the Board what it wanted to hear, what it hoped would have a negative influence on the union's bargaining position. Would the Board have been as anxious to hear a speaker in opposition to Holmquist, or ten speakers, or 1,200 speakers? Would it care to hear 1,200 speakers on each of the 13 unresolved items that were then on the table? Would it care to hear 1,200 speakers on all of the items that were originally put on the table? And if 1,200 speakers is distinguishable from one speaker by virtue of their numbers, where would the line be drawn? The 'obligation to treat with the true representative ... and the

negative duty to treat with *no* other' [8] was a wise statutory policy. It has stood the test of time.

Because of the wisdom of the policy and because of the havoc that the opposite could wreak on collective bargaining as a successful institution, all dealings outside of the recognized representative should be discouraged. In applying the term 'bargaining' to fact situations, it should be given broad construction to include everything but the most insubstantial, innocuous, and indeed unplanned communication between employers and employees. It should certainly include situations such as the present one where:

1. It related specifically to a demand the union had on the table;
2. it involved not a person speaking only as an individual, but rather as a representative;
3. it was preceded by planning and effort to gain support from other employees;
4. it was presented in a formal way at a meeting of the Board with all members present;
5. it was specifically intended to influence the Board in its dealings with the Union.

A contrary ruling in a case such as this would only be a formal invitation to dissident employees to address their employers on wages, hours, and conditions of employment. It would be an invitation to unions to stack employer's meetings with loyalists to defend their bargaining positions. It could make a mockery and a shambles out of collective bargaining."

Discussion

There are four basic issues which the Commission must determine herein. They are as follows:

---

[8] *NLRB v. Jones & Laughlin Steel Corp.* 501 U.S. 1 (1937)

1. Would the Board have violated Holmquist's right of constitutional free speech by denying him the opportunity to speak and orally present the petition involved?

   If the Commission finds in the negative on Issue 1;

2. In permitting Holmquist to speak and orally present the petition, did the Board violate its statutory duty to bargain with MTI as the exclusive collective bargaining representative?
3. Does Article II, A of the collective bargaining agreement permit the activity involved without affecting the Board's duty to bargain?
4. Does the fact that Holmquist's presentation before the Board related to MTI's fair share proposal affect the Board's duty to bargain?

Issue 1

Holmquist appeared and orally presented the petition involved to the Board, not as an agent of MTI, the exclusive collective bargaining representative, but as a claimed representative of a minority of teachers who were opposed to the Board's granting of a fair share agreement. Our Supreme Court in *Milwaukee Board of School Directors, supra,* rejected the contention that prohibiting a representative of a minority union to speak before the school board, while the latter had not completed its negotiations with the majority organization, violated the constitutional rights of said minority representative.[9] We see no distinction in the fact that Holmquist did not represent a "minority organization". He did in fact represent a minority of the teachers, whose views were opposed to those of MTI with respect to a fair share agreement.

---

[9] The Court reversed the Commission's conclusion in said regard.

Therefore we conclude that the Board would not have violated Holmquist's constitutional right of free speech by denying him the opportunity to speak and orally present the petition involved.

Issue 2

In *Milwaukee Board of School Directors, supra,* the school board involved, on two separate occasions denied a representative of a minority organization the opportunity to speak at its open meeting. In said case our Supreme Court stated ".... if the minority union representative is permitted to influence the decision of the school board by his argument, then he is truly negotiating". Holmquist intended to influence the Board on the fair share issue. His statement is clear to that matter. After the public meeting the members of the Board went into executive session, returned and announced its offer to the MTI representatives, which rejected a fair share agreement. Whether the Board rejected the fair share proposal as a result of, or not a result of, Holmquist's remarks, is not necessary for the Commission to determine. The fact is that Holmquist's motive and purpose was intended to persuade the Board not to agree to the fair share agreement as proposed by the exclusive collective bargaining representative. The Board's activity with respect to the Holmquist incident, which occurred during the Board's open meeting, constituted an erosion of its duty to bargain exclusively with the MTI and with no other organization, group of employes, or a single employe. The cases cited by the District in its brief are not applicable to the circumstances involved in the instant proceeding.

Issue 3

Article II A. d. of the collective bargaining agreement existing between the parties at the time of the event involved, in our opinion, does not "legalize" the Board's activity with respect to Holmquist's remarks to the Board at its open meeting. The provision involved, when viewed in context with subpara c. of

the Article, indicates that the Board and MTI agreed that negotiable subjects may only be negotiated by the Board and the MTI, even though such matters may be brought to the attention of either the Board or MTI. Various supervisory personnel of the Board were aware of Holmquist's activity prior to the open meeting. He could have properly presented his petition to the Board by means other than an appearance at the open Board meeting. If that would have occurred the Board was contractually obligated to immediately inform MTI thereof. Even if the Board members were not aware of Holmquist's intentions at the open meeting, prior to his remarks an inquiry should have been made as to the intent and purpose for which he sought to speak. Had he indicated the purpose of his appearance and remarks, the Board should have denied him recognition and informed him to submit a written statement to both the Board and MTI. Perhaps the recognition of Holmquist and the receipt of his oral statement was not motivated by any anti-union animus on behalf of the Board, nevertheless by so doing the Board did not fulfill its statutory duty to bargain in good faith with the MTI as the exclusive collective bargaining representative.

Issue 4

The pertinent portion of Sec. 111.70(2) of MERA material to this particular issue reads as follows:

> "... except that employes may be required to pay dues in the manner provided in a fair-share agreement. Such fair-share agreement shall be subject to the right of the municipal employer or a labor organization to petition the commission to conduct a referendum. Such petition must be supported by proof that at least 30% of the employes in the collective bargaining unit desire that the fair-share agreement be terminated. Upon so finding, the commission shall conduct a referendum. If the continuation of the agreement is not supported by at least the majority of the eligible employes, it shall be deemed terminated. ..."

We do not agree with MTI that the statute does not permit an employer to accept or consider a written poll of its employes as part of its decision to accept or reject a fair share proposal. The statute permits the implementation of a fair share agreement without a referendum among the employes authorizing same. After the implementation of a fair share agreement, either the employer or a labor organization may file a petition for a referendum to determine whether the employes involved desire the continuation of the fair share agreement. Such a petition must be supported by a showing of interest of at least 30% of the employes in the unit involved. There is nothing in the statute which prohibits an employer from receiving a showing of interest opposing the fair share agreement prior to the implementation of a fair share agreement. The rules of the Commission provide for a stipulation requesting a referendum prior to implementation of a fair share agreement, provided therein the employer agrees to implement same should the required number of employes favor same, and, further, providing the union involved agrees to withdraw its fair share proposal should the required number of employes not vote in favor thereof./[10]

The presentation of a showing of interest by the employes may very well have an impact on whether the parties will execute such a stipulation. And if so, the results of the referendum would be binding, and thus stabilize any possible issue with respect to the implementation of a fair share agreement. If the employes vote in favor of a fair share agreement, and such an agreement is implemented following the referendum, pursuant to the rules of the Commission, [11]/ an isolation period for the conduct of a subsequent referendum is established, thus further stabilizing the collective bargaining relationship.

/[10]ERB 15.03

/[11]ERB 15.11 (2) (c)

However, in the instant proceeding, the manner in which the Board received the "showing of interest", namely permitting Holmquist to speak on a bargaining issue at an open Board meeting, exceeded the bounds of permissable conduct with reference to the receipt of a showing of interest requesting the conduct of a referendum, either seeking an initial referendum or, assuming an existing fair share agreement, a subsequent referendum.

Conclusion

In accordance with the above rationale the Commission has concluded that the District, by its Board, committed prohibited practices as alleged in the complaint. The Commission does not deem it necessary to effectuate the policy of MERA to require the Board to expunge from its official minutes any references therein relating to the appearance and remarks of Holmquist at the December 6, 1971 meeting. However, it has ordered the School Board to incorporate the Commission's decision in its official minutes.

Dated at Madison, Wisconsin, this *13th* day of September, 1972.

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

By *Morris Slavney /s/*
Morris Slavney, Chairman

Zel S. Rice II /s/
Zel S. Rice II, Commissioner

Jos. B. Kerkman /s/
Jos. B. Kerkman, Commissioner

(DENIAL of Rehearing)

No. 410

August Term, 1974

STATE OF WISCONSIN: IN SUPREME COURT
CITY OF MADISON
JOINT SCHOOL DISTRICT NO. 8 et al.
Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION.
Respondent.

MADISON TEACHERS INCORPORATED,
Intervenor Respondent.

Per Curiam. Motion for rehearing denied without costs

Date entered: September 30, 1975

IN THE SUPREME COURT OF THE
STATE OF WISCONSIN

August Term 1974 No. 410

CITY OF MADISON,
JOINT SCHOOL DISTRICT NO. 8, et al.,
Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
Respondent,

MADISON TEACHERS, INCORPORATED,
Intervenor Respondent

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that the CITY OF MADISON, JOINT SCHOOL DISTRICT NO. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG, BURKE AND WESTPORT AND ITS AGENT THE BOARD OF EDUCATION, CITY OF MADISON JOINT SCHOOL DISTRICT NO. 8, appellants above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Wisconsin, affirming the judgment of the Dane County Circuit Court which affirmed the order of the Wisconsin Employment Relations Commission, entered in this action on September 30, 1975.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257(2).

Dated December 5, 1975.

/s/ Henry A. Gempeler
Henry A. Gempeler
City Attorney

/s/ Gerald C. Kops
Gerald C. Kops
Deputy City Attorney

Attorneys for Appellants

The notice of Appeal was filed with the Wisconsin Supreme Court December 5, 1975

111.70 Municipal employment. (1) DEFINITIONS. As used in this subchapter:

(a) "Municipal employer" means any city, county, village, town, metropolitan sewerage district, school district, or any other political subdivision of the state which engages the services of an employe and includes any person acting on behalf of a municipal employer within the scope of his authority, express or implied.

(b) "Municipal employe" means any individual employed by a municipal employer other than an independent contractor, supervisor, or confidential, managerial or executive employe.

(c) "Commission" means the employment relations commission.

(d) "Collective bargaining" means the performance of the mutual obligation of a municipal employer through its officers and agents, and the representatives of its employes, to meet and confer at reasonable times, in good faith, with respect to wages, hours and conditions of employment with the intention of reaching an agreement, or to resolve questions arising under such an agreement. The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession. Collective bargaining includes the reduction of any agreement reached to a written and signed document. The

employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employes. In creating this subchapter the legislature recognizes that the public employer must exercise its powers and responsibilities to act for the government and good order of the municipality, its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured to public employes by the constitutions of this state and of the United States and by this subchapter.

(e) "Collective bargaining unit" means the unit determined by the commission to be appropriate for the purpose of collective bargaining.

(f) "Craft employe" means a skilled journeyman craftsman, including his apprentices and helpers, but shall not include employes not in direct line of progression in the craft.

(g) "Election" means a proceeding conducted by the commission in which the employes in a collective bargaining unit cast a secret ballot for collective bargaining representatives, or for any other purpose specified in this subchapter.

(h) "Fair-share agreement" means an agreement between a municipal employer and a labor organization under which all or any of the employes in the collective bargaining unit are required to pay their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required of all members. Such an agreement shall contain a provision requiring the employer to deduct the amount of dues as certified by the labor organization from the earnings of the employes affected by said agreement and to pay the amount so deducted to the labor organization.

(i) "Labor dispute" means any controversy concerning wages, hours and conditions of employment, or concerning the representation of persons in negotiating, maintaining, changing or seeking to arrange wages, hours and conditions of employment.

(j) "Labor organization" means any employe organization in which employes participate and which exists for the purpose, in whole or in part, of engaging in collective bargaining with municipal employers concerning grievances, labor disputes, wages, hours or conditions of employment.

(k) "Person" means one or more individuals, labor organizations, associations, corporations or legal representatives.

(l) "Professional employe" means:

1. Any employee engaged in work:

a. Predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work;

b. Involving the consistent exercise of discretion and judgment in its performance;

c. Of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time;

d. Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher education or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical process; or

2. Any employe who:

a. Has completed the courses of specialized intellectual instruction and study described in subd. 1. d;

b. Is performing related work under the supervision of a professional person to qualify himself to become a professional employe as defined in subd. 1.

(m) "Prohibited practice" means any practice prohibited under this subchapter.

(n) "Referendum" means a proceeding conducted by the commission in which employes in a collective bargaining unit may cast a secret ballot on the question of authorizing a labor organization and the employer to continue a fair-share agreement. Unless a majority of the eligible employes vote in favor of the fair-share agreement, it shall be deemed terminated and that portion of the collective bargaining agreement deemed null and void.

(o) "Supervisor" means:

1. As to other than municipal and county firefighters, any individual who has authority, in the interest of the municipal employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employes, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

2. As to firefighters employed by municipalities with more than one fire station, the term "supervisor" shall include all officers above the rank of the highest ranking officer at each single station. In municipalities where there is but one fire station, the term "supervisor" shall include only the chief and the officer in rank immediately below the chief. No other firefighter shall be included under the term "supervisor" for the purposes of this subchapter.

(2) RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, and such employes shall have the right to refrain from any and all such activities except that employes may be required to pay dues in the manner provided in a fair-share agreement. Such fair-share agreement shall be subject to the right of the municipal employer or a labor organization to petition the commission to conduct a referendum. Such petition must be supported by proof that at least 30% of the employes in the collective bargaining unit desire that the fair-share agreement be terminated. Upon so finding, the commission shall conduct a referendum. if the continuation of the agreement is not supported by at least the majority of the eligible employes, it shall be deemed terminated. The commission shall declare any fair-share agreement suspended upon such conditions and for such time as the commission decides whenever it finds that the labor organization involved has refused on the basis of race, color, creed or sex to receive as a member any employe of the municipal employer in the bargaining unit involved, and such agreement shall be made subject to this duty of the commission. Any of the parties to such agreement or any municipal employe covered thereby may come before the commission, as provided in s. 111.07, and ask the performance of this duty.

(3) PROHIBITED PRACTICES AND THEIR PREVENTION. (a) It is a prohibited practice for a municipal employer individually or in concert with others:

1. To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2).

2. To initiate, create, dominate or interfere with the formation or administration of any labor or employe

organization or contribute financial support to it, but the employer shall not be prohibited from reimbursing its employes at their prevailing wage rate for the time spent conferring with the employes, officers or agents. Supervisors may remain members of the same labor organization of which their subordinates are members, but such supervisor shall not participate in determinations of the collective bargaining policies of such labor organization or resolution of grievances of employes. After January 1, 1974, said supervisors shall not remain members of such organizations.

3. To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment; but the prohibition shall not apply to a fair-share agreement.

4. To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. Such refusal shall include action by the employer to issue or seek to obtain contracts, including those provided for by statute, with individuals in the collective bargaining unit while collective bargaining, mediation or fact-finding concerning the terms and conditions of a new collective bargaining agreement is in progress, unless such individual contracts contain express language providing that the contract is subject to amendment by a subsequent collective bargaining agreement. Where the employer has a good faith doubt as to whether a labor organization claiming the support of a majority of its employes in an appropriate bargaining unit does in fact have that support, it may file with the commission a petition requesting an election to that claim. An employer shall not be deemed to have refused to bargain until an election has been held and the results thereof certified to the employer by the commission. The violation shall include though not be limited thereby, to the refusal to execute a collective bargaining agreement previously agreed upon. The term of any collective bargaining agreement shall not exceed 3 years.

5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award, where previously the parties have agreed to accept such award as final and binding upon them.

6. To deduct labor organization dues from an employe's or supervisor's earnings, unless the municipal employer has been presented with an individual order therefore, signed by the municipal employe personally, and terminable by at least the end of any year of its life or earlier by the municipal employe giving at least 30 days' written notice of such termination to the municipal employer and to the representative organization, except where there is a fair-share agreement in effect.

(b) It is a prohibited practice for a municipal employe, individually or in concert with others:

1. To coerce or intimidate a municipal employe in the enjoyment of his legal rights, including those guaranteed in sub. (2).

2. To coerce, intimidate or induce any officer or agent of a municipal employer to interfere with any of its employes in the enjoyment of their legal rights, including those guaranteed in sub. (2), or to engage in any practice with regard to its employes which would constitute a prohibted practice if undertaken by him on his own initiative.

3. To refuse to bargain collectively with the duly authorized officer or agent of a municipal employer, provided it is the recognized or certified exclusive collective bargaining representative of employes in an appropriate collective bargaining unit. Such refusal to bargain shall include, but not be limited to, the refusal to execute a collective bargaining agreement previously agreed upon.

4. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award, where previously the parties have agreed to accept such awards as final and binding upon them.

5. To coerce or intimidate an independent contractor, supervisor, confidential, managerial or executive employe, officer or agent of the municipal employer, to induce him to become a member of the labor organization of which employes are members.

(c) It is a prohibited practice for any person to do or cause to be done on behalf of or in the interest of municipal employers or municipal employes, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by par (a) or (b).

(d) Nothing in this subchapter shall preclude law enforcement or firefighting supervisors from organizing separate units of supervisors for purposes of negotiating with their municipal employers. The commission shall by rule establish procedures for certification of such units of supervisors and the levels of supervisors to be included. The commission may require that the representative in a supervisory unit shall be an organization that is a separate local entity from the representative of the employes but such requirement shall not prevent affiliation by a supervisory representative with the same parent state.

(4) POWERS OF THE COMMISSION. The commission shall be governed by the following provisions relating to bargaining in municipal employment in addition to other powers and duties provided in this subchapter:

(a) *Prevention of prohibited practices.* Section 111.07 shall govern procedure in all cases involving prohibited practices under this subchapter except that wherever the term "unfair labor practices" appears in s. 111.07 the term "prohibited practices" shall be substituted.

(b) *Failure to bargain.* Whenever a dispute arises between a municipal employer and a union of its employes concerning the duty to bargain on any subject, the dispute shall be resolved by the commission on petition for a declaratory ruling. The decision of the commission shall be issued within 15 days of submission and shall have the effect of an order issued under s. 111.07. The filing of a petition under this paragraph shall not prevent the inclusion of the same allegations in a complaint involving prohibited practices in which it is alleged that the failure to bargain on the subjects of the declaratory ruling is part of a series of acts or pattern of conduct prohibited by this subchapter.

(6) DECLARATION OF POLICY. The public policy of the state as to labor disputes arising in municipal employment is to encourage voluntary settlement through the procedures of collective bargaining. Accordingly, it is in the public interest that municipal employes so desiring be given an opportunity to bargain collectively with the municipal employer through a labor organization or other representative of the employes' own choice. If such procedures fail, the parties should have available to them a fair, speedy, effective and, above all, peaceful procedure for settlement as provided in this subchapter.

CONSTITUTIONAL PROVISIONS INVOLVED

ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ARTICLE XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.